83-1258

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NO. .....

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

MICHIGAN DEPARTMENT OF MENTAL HEALTH, Petitioner,

v

DAVID L. RASIMAS, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the decision by the Court of Appeals that respondent timely filed a charge of employment discrimination with the Equal Employment Opportunity Commission is in direct conflict with Mohasco Corp v Silver, 447 US 807 (1980).

A. Whether Mohasco Corp v Silver should be given retroactive effect.

B. If Mohasco is not to be applied retroactively, whether the doctrine announced in Davis v Calgon Corp, 627 F2d 674 (3rd Cir, 1980) should be applied retroactively and whether to do so conflicts with other decisions of the Court of Appeals applicable in 1975 and 1976 requiring that the charge of employment discrimination be filed with the Michigan Civil Rights Commission or the EEOC within 180 days from the date of discharge.

II. Whether the Court of Appeals has decided the question of discrimination in a way which is in conflict with Texas Dept of Community Affairs v Burdine, 450 US 248 (1981) and U.S. Postal Service Board of Governors v Aikens, ___ US ___, 75 L Ed 2d, 403, 103 S Ct 1478 (1983) by permitting a finding of discrimination to be affirmed when neither the district court or the court of appeals found that petitioner "intentionally discriminated against" the respondent.

III. Whether the decision of the Court of Appeals of the Sixth Circuit that unemployment benefits should not be deducted on back pay awards is in conflict with the decision of other federal Courts of Appeals.

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In The

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October Term, 1983

MICHIGAN DEPARTMENT OF
MENTAL HEALTH,

Petitioner,

v

DAVID L. RASIMAS,

Respondent.

PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
SIXTH CIRCUIT

OPINIONS BELOW

Respondent Rasimas, a white male, claimed that he was discriminatorily discharge from his job with the Michigan Department of Mental Health because of his gender. He brought an action under Title VII of the Civil Rights Act of 1964, as amended, 42 USC 2000e, et seq. After trial, the United States District Court for the Eastern District of Michigan,

Southern Division, the Honorable James Harvey presiding, rendered a memorandum opinion and order and judgment dismissing the case. David L. Rasimas v Michigan Dept of Mental Health, No. 77-71697 (ED Mich, Sept. 16, 1980). The Court found that David L. Rasimas did not timely file a charge of employment discrimination with the Equal Employment Opportunity Commission. Mohasco Corp v Silver, 447 US 807 (1980). The Court also found that Rasimas' discharge on July 15, 1975 was the product of illegal discrimination based upon his sex. 42 USC 2000e-2(a)(1). Further, the Court found that Rasimas failed to make reasonably diligent efforts to obtain other employment to mitigate his damages.

David L. Rasimas appealed from the order of the district court on the question of timeliness and mitigation of damages. Michigan Department of Mental

Health filed a cross appeal on the issue of discrimination. In Rasimas v Michigan Dept of Mental Health, 714 F2d 614 (6th Cir, 1983), a majority of the Court affirmed the sex discrimination finding but reversed the timeliness and mitigation of damages determinations. Since the District Court never fully addressed the back pay issue, the Court of Appeals remanded the action to the District Court for further proceedings. On remand the District Court was to award back pay in accordance with various guidelines outlined by the Court. Senior District Judge Hoffman concurred in part and dissented in part. He would have vacated and remanded the case to permit the lower court to make specific findings and conclusions in light of Zipes v Trans World Airlines, Inc., 455 US 385 (1982), reh'g denied, Independent Federation of Flight Attendants v Trans World Airlines, Inc., 456 US 940 (1982). Further, he

would have remanded the case for additional findings as to the existence of intentional discrimination. As to mitigation of damages, whether unemployment insurance benefits should be deducted from an award of back pay should be left to the sound discretion of the trial judge.

Michigan Department of Mental Health filed a petition for rehearing on November 2, 1983. The rehearing was denied. Rasimas v Michigan Dept of Mental Health, 714 F2d 614 (6th Cir, reh'g denied, November 2, 1983).

JURISDICTION

Petitioner seeks review of the Court of Appeals opinion decided and filed July 28, 1983 and order denying rehearing filed November 2, 1983. This Court's jurisdiction is invoked under 28 USC 1254(1).

STATUTES AND CODE PROVISIONS INVOLVED

42 USC 2000e-2(a) states:

> "(a) It shall be an unlawful employment practice for an employer--
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his

status as an employee, because of such individual's race, color, religion, sex, or national origin."

42 USC 2000e5(c) states:

"(c) State or local proceedings. In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a)[(b)] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the

proceeding shall be deemed to have been commenced for the purpose of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority."

42 USC 2000e-5(e) states:

"(e) Time for filing charges. A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the

proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency."

42 USC 2000e-5(g) states:

"(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a

> union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title."

29 CFR § 1601.12(b)(1)(v)(A)(1975) states:

> "In cases where the document is submitted to the Commission more than 180 days from the date of the alleged violation but within the period of limitation of the particular 706 Agency, the case shall be deferred pursuant to the procedures set forth above: Provided, however, That unless the Commission is earlier notified of the termination of the State or local proceedings, the Commission will consider the charge to be filed with the Commission on the 300th day following the alleged discrimination and will commence processing the case. Where the State or local agency terminates its proceedings prior to the 300th

day following the alleged act of discrimination, without notification to the Commission of such termination, the Commission will consider the charge to be filed with the Commission on the date the person making the charge was notified of the termination."

MCL 423.307(b) states:

"(b) Any individual claiming to be aggrieved by an alleged unlawful employment practice may, by himself or his agent, make, sign and file with the board, within 90 days after the alleged act of discrimination, a verified complaint in writing, which shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unlawful employment practice complained of, and which shall set forth the particulars thereof and contain such other information as may be required by the board. Any employer whose employees, or some of whom, refuse or threaten to refuse to cooperate with the provisions of this act, may file with the board a verified complaint asking for assistance by conciliation or other remedial action."

STATEMENT OF THE CASE

Respondent, David Rasimas, is a white male(1)[1] who, on May 18, 1975 was employed by the Michigan Department of Mental Health as a Mental Retardation Program Supervisor 10 at the Macomb-Oakland Regional Center (MORC).(6) He was hired on the recommendation of two women, Jan Nagy and Caron Bender-Swietec. (10) His responsibilities included working with children who are mentally retarded and developmentally disabled and supervising staff personnel who also carry out the therapeutic program being provided to the children.(12) He supervised women and his two immediate supervisors were women (Nagy and Swietec).(7 & 8)

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[1]References are to numbered paragraphs in the Memorandum Opinion and Order of the District Court, September 16, 1980, under "Findings of Fact."

On July 15, 1975, he was terminated for unsatisfactory service. The ultimate decision to terminate him was made by a male. Factors leading to that conclusion included his failure to maintain good relationships with his staff, his failure to satisfactorily implement supervisory directives, his failure to take adequate precautions for the health and safety of the resident-patients under his supervision, and his failure to make adequate progress in developing the skills necessary in his position.(35)

The incident which precipitated his termination occurred on July 12, 1975 when the respondent and three staff members took four resident patients to Belle Isle in a van. During the course of the trip, one of the children began to vomit, had seizures, was trembling, had incipient cyanosis about the edges of her mouth and repeated vomitting. In

spite of the child's condition, respondent as supervisor, continued the trip. (29 & 30)

On July 28, 1975, respondent filed a grievance procedure form with the Michigan Civil Service Commission.(39) The Civil Service Hearing Officer found that plaintiff was removed from his position for good cause, but rather than the discipline of termination, plaintiff should be reinstated and demoted to the position of Activities Training Aide 05 (a position he had held at Northville State Hospital from August 13, 1972 until being hired at MORC) and placed on a layoff register until an opening arose at that position.(41) When respondent was notified of an impending opening in the position of Activities Training Aide 05, respondent declined the interview.(45 & 48)

On March 16, 1976, respondent went to the Office of the Michigan Department of Civil Rights and to an office of the Federal Equal Employment Opportunity Commission where he signed an affidavit complaining of his dismissal from Macomb-Oakland Regional Center.(52-53) Respondent received a notice of right to sue within 90 days from the EEOC on April 12, 1977(57) and then filed an action in the United States District Court for the Eastern District of Michigan on July 11, 1977, claiming that he was discriminatorily discharged from his job with the Michigan Department of Mental Health on account of his sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 USC 2000e, et seq.

After a trial that concluded on September 3, 1980, the District Court issued a memorandum opinion and order and judgment whereby it followed Mohasco v

Silver, 447 US 801 (1980) and concluded that respondent did not make a timely filing with the EEOC prior to commencing the case. The Court also found that respondent's discharge on July 15, 1975 was the product of illegal discrimination based upon his sex and that respondent failed to make reasonably diligent efforts to obtain other employment to mitigate his damages. Respondent appealed that judgment insofar as the District Court found that respondent did not make a timely filing with the EEOC and insofar as it found that respondent failed to mitigate his damages. Petitioner cross appealed insofar as the District Court found respondent's discharge on July 15, 1975 was the product of illegal discrimination based upon respondent's sex.

On July 28, 1983, the United States Court of Appeals for the Sixth Circuit, Senior District Judge Hoffman concurring

in part and dissenting in part, delivered its opinion which in relevant part refused to apply Mohasco v Silver, supra, to the case at bar saying it should not be applied retroactively. However, the Sixth Circuit did apply Davis v Calgon Corp, 627 F2d 674 (CA 3, 1980), cert den 449 US 1101 (1981) retroactively and concluded that respondent did timely file a charge of employment discrimination with EEOC. Second, a majority of the Court of Appeals affirmed the sex discrimination finding of the District Court without finding petitioner intentionally discriminated against respondent. Third, the Court of Appeals reversed the finding of the District Court that respondent failed to mitigate his damages. Fourth, the Court remanded the case to the District Court for further proceedings saying that the Court should award back pay in accordance with certain guidelines

which, inter alia, required that back pay not be reduced by the amount of unemployment benefits received by claimant.

On August 10, 1983, petitioner filed a petition for rehearing with the Court of Appeals which was denied on November 2, 1983.

Petitioner seeks review of the Court of Appeals opinion decided and filed July 28, 1983 and the denial of rehearing filed November 2, 1983.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BY THE COURT OF APPEALS THAT RESPONDENT TIMELY FILED A CHARGE OF EMPLOYMENT DISCRIMINATION WITH THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IS IN DIRECT CONFLICT WITH MOHASCO CORP v SILVER, 447 US 807 (1980)

The Court of Appeals correctly summarized the applicable law relating to the requirement that a charge of employment discrimination be timely filed with the Equal Employment Opportunity Commission (EEOC) as follows:

> "The timely filing of a complaint with the EEOC is a procedural prerequisite to the enforcement of a Title VII action in federal court. This requirement, however, is not jurisdictional, rather it is in the nature of a statute of limitations. See Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982), reh'g denied, Independent Federation of Flight Attendants v. Trans World Airlines, Inc., 456 U.S. 940 (1982). A charge of discrimination should be filed with the EEOC within 180 days

> after the last discriminatory act. 42 U.S.C. § 2000e-5(e). However, in deferral states, states with fair employment agencies, claimants must file charges with the state agency before pursing their claims with the EEOC. 42 U.S.C. §2000e-5(c). The EEOC will not formally file charges it has received until after the state agency has terminated its proceedings or sixty days have elapsed, whichever occurs earlier. Mohasco Corp. v. Silver, 447 U.S. 807 (1980). In deferral states all complaints must be filed with the EEOC within 300 days after the act of discrimination or within thirty days after receiving notice that the state has terminated its proceedings. 42 U.S.C. §2000e-5(e)." Footnotes deleted. Rasimas v Michigan Dept of Mental Health, 714 F2d 614, 620-621 (6th Cir, 1983).

The case at bar is factually indistinguishable from Mohasco Corp v Silver, supra, insofar as the question of whether respondent timely filed a charge of employment discrimination with the Equal Employment Opportunity Commission.

In Mohasco, the employee was discharged on August 29, 1975. On June 15,

1976 -- 291 days later -- the employee submitted a charge of discrimination to the EEOC. Because New York was a deferral state under 29 CFR §1601.74 and 42 USC § 2000e5(c) requires EEOC to defer to the state agency for 60 days, the charge submitted on June 15, 1976, had to be held in abeyance for 60 days before a filing of the charge with EEOC could be effected. Under these circumstances, Mohasco says that the employee cannot effect a filing of a charge with EEOC within 300 days as required by 42 USC § 2000e-5(e) -- 291 days plus 60 days equals 351 days. This Court thus found the charge was not timely filed with EEOC.

In the case at bar, the employee was discharged on July 15, 1975. On March 16, 1976 -- 244 days later -- the employee submitted a charge of discrimination to the EEOC. Because Michigan,

like New York, is a deferral state, 29 CFR §1601.74, and 42 USC § 2000e5(c) requires EEOC to defer to the state agency for 60 days, the charge submitted on March 16, 1976, had to be held in abeyance for 60 days before a filing of the charge with EEOC could be effected. Under these circumstances, employee Rasimas, like the employee in Mohasco, cannot file a charge with EEOC within 300 days as required by 42 USC § 2000e-5(e) -- 244 days plus 60 days equals 304 days.[2]

Although the Court of Appeals did not deny that Rasimas was factually indistinguishable from Mohasco, it did

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[2]The District Court found that respondent alleged no facts which would justify the tolling of the 300-day period on equitable grounds -- see Memorandum Opinion, Conclusion of Law, paragraph 2 -- and thus Zipes v Trans World Airlines, Inc., supra, is not applicable.

refuse to apply Mohasco retroactively to the case at bar relying on Wiltshire v Standard Oil of California, 652 F2d 837 (9th Cir, 1981), cert den 455 US 1034 (1982); Hall v Ledex, Inc., 669 F2d 397, 399 (6th Cir, 1982); and Jones v AIRCO Carbide Chemical Co, 691 F2d 1200 (6th Cir, 1982).

Nonetheless, the Court of Appeals did apply decisions of various other Courts of Appeals retroactively to the case at bar such as Davis v Calgon Corp, 627 F2d 674 (3rd Cir, 1980), cert den 449 US 1101 (1981) and concluded that respondent was not required to file a charge of discrimination within the State statute of limitations applicable to the deferral agency.

At the time respondent was terminated, in order for him to receive the benefit of the 300-day time limitation rather than the 180 day limitation, he

was required to timely file his charge of employment discrimination with the state deferral agency. Rasimas did not do that. Rasimas filed 244 days after he was terminated. At the time, Michigan law required that a charge of discrimination be filed within 90 days of the discriminatory act. MCL 423.307(b).

The Court of Appeals, however, has applied Davis v Calgon Corp, supra, retroactively but has not applied Mohasco Corp v Silver, supra, retroactively. Petitioner submits that the applicable law must either be that which was in existence on July 15, 1975, the date of respondent's termination or that which was in existence at the time Mohasco Corp v Silver, supra, was decided by this Court. In essence, the Court of Appeals has extended the statutory time limitations for filing a charge of employment discrimination imposed by Congress and

upheld by this Court. In doing so the Court of Appeals has failed to give effect to the congressional intent requiring the prompt processing of all charges of employment discrimination.

A.

MOHASCO CORP v SILVER SHOULD BE GIVEN RETROACTIVE EFFECT

As noted by Senior District Judge Hoffman, this Court, in essence, has already concluded that Mohasco should be applied retroactively. This Court decided Zipes v Trans World Airlines, Inc., 455 US 385 (1982) subsequent to Mohasco and at no point did the Court suggest that Mohasco should be applied prospectively only. The employees in Zipes were discharged in 1970 long before the discharge of the employee in Mohasco or the employee in the case at bar.

Petitioner submits that Mohasco should be applied to the case at bar. Rasimas was discharged less than one and one half months before Silver. Before trial in Rasimas, the Mohasco decision was rendered by this Court. Merely because Mohasco reached this Court before Rasimas does not constitute sufficient reason to preclude giving effect to a statutory requirement that a charge of employment discrimination be filed in a timely and expeditious manner. This is not a situation similar to most questions dealing with retroactivity involving judicial interpretation of constitutional guarantees. This Court has not changed its interpretation of a constitutional provision by rendering its decision in Mohasco. This Court in Mohasco reviewed the intent of Congress and concluded that it was incumbent upon the Court to give effect to that intent. The Court of

Appeals cannot circumvent that intent by extending those time limitations.

The test for determining whether a judicial decision should be given retroactive effect has been set forth in Chevron Oil Co v Huson, 404 US 97 (1971) where it was said:

> "In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied ..., or by deciding an issue of first impression whose resolution was not clearly foreshadowed .... Second, it has been stressed that 'we must ... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' ... Finaly, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our

> cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.'"

As in the case at bar, petitioner submits none of the above criteria require or condone the ruling of the Sixth Circuit in not following Mohasco.

First, as was pointed out in Wiltshire, supra, this Court in Mohasco discussed the conflicting approaches taken by the Seventh, Eighth and Tenth Circuits on the filing requirement challenged. Moore v Sunbeam Corp, 459 F2d 811 (7th Cir, 1972) was in accord with the timeliness requirements articulated in Mohasco Corp v Silver. A decision of the Seventh Circuit foreshadowed the decision in Mohasco as well as did a literal reading of the statutory provision in question.

Second, giving retroactive effect to Mohasco achieved the purpose and effect of the time limitations imposed by

Congress, to wit: the encouragement of the prompt processing of all charges of employment discrimination. Furthermore, contrary to what Wiltshire v Standard Oil Co of Cal, supra, stated, EEOC had not "for fifteen years, steadfastly maintained one consistent interpretation of the rule, viz., that the EEOC will consider as timely all complaints filed with the agency within 300 days of the discriminatory event." EEOC had required charges of employment discrimination be filed "within the period of limitation of the particular 706 Agency" before the claimant would be entitled to the 300-day limitation period as opposed to the 180-day limitation period. See 29 CFR § 1601.12(1)(V)(a) (1975) where it is stated:

> "'In cases where the document is submitted to the Commission more than 180 days from the date of the alleged violation but within the period of limitation

> of the particular 706 Agency, the case shall be deferred .... Provided, however, that unless the Commission is earlier notified of the termination of the State or local proceeding, the Commission will consider the charge to be filed with the Commission on the 300th day following the alleged discrimination and will commence processing the case." (Emphasis supplied).

Third, as to whether equitable results from the retroactive application of Mohasco are evident, it is significant to note that this Court believed that a lay person was more apt to regard the statute as establishing a 180-day filing deadline. Mohasco, 447 US at 825. Furthermore, EEOC has also indicated that for there to be a timely filing with EEOC under the 300-day period, the claimant would have to file within the time limitations of the state agency. Respondent Rasimas did not file within the time limitations of the state deferral agency. Rasimas was not diligent

in filing his charges of discrimination. It is equitable under these circumstances to give effect to Congress' intent that such charges be processed without delay.

For the foregoing reasons, Mohasco should be applied to the case at bar.

B.

IF MOHASCO IS NOT TO BE APPLIED RETROACTIVELY, THE DOCTRINE ANNOUNCED IN DAVIS v CALGON CORP, 627 F2d 674 (3rd Cir, 1980) SHOULD NOT BE APPLIED RETROACTIVELY AND TO DO OTHERWISE, AS THE SIXTH CIRCUIT COURT OF APPEALS HAS DONE, IS IN CONFLICT WITH OTHER DECISIONS OF THE COURT OF APPEALS APPLICABLE IN 1975 AND 1976 REQUIRING THAT THE CHARGE OF EMPLOYMENT DISCRIMINATION BE FILED WITH THE MICHIGAN CIVIL RIGHTS COMMISSION OR THE EEOC WITHIN 180 DAYS FROM THE DATE OF DISCHARGE

Assuming the Court of Appeals was correct in not applying Mohasco to the case at bar, the opinion of the Court of Appeals filed on July 28, 1983 overlooks and misapprehends the law as it existed in 1975 and 1976 with regard to filing a charge of employment discrimination on a

timely basis. If Mohasco does not apply, the laws that existed at the time respondent filed his charge of employment discrimination in 1976 rather than the doctrine announced 4 years later in Davis v Calgon Corp, 627 F2d 674 (3rd, Cir, 1980) should apply. In 1975 and 1976, under Michigan as well as federal law, a charge of employment discrimination had to be filed either with the Michigan Civil Rights Commission or with the EEOC within 180 days from the date of the employee's discharge. See Geromette v General Motors Corp, 609 F2d 1200 (6th Cir, 1979) relying on Olson v Rembrandt Printing Co, 511 F2d 1228 (8th Cir, 1975 en banc). Respondent in the case at bar did not file his charge of employment discrimination within the state time limitations or within the 180-day limitations set forth in Title VII. Only beginning in 1980 are there a series of

cases in which the various Courts of Appeals state that the 180-day requirement of Title VII does not apply to a deferral state. Those cases should, applying the reasoning of Wiltshire, not be applied retroactively. Accordingly, the charge of employment discrimination filed by the plaintiff on March 16, 1976, some 244 days after his termination, was not timely by virtue of the law as it existed in 1975 and 1976.

Furthermore, although the Court of Appeals opined that "the EEOC's position is entitled to great deference," the opinion rendered by the Court fails to give their position great deference since the rules of EEOC required prior to Mohasco Corp that a charge of employment discrimination was timely filed if and only if the filing with the state agency was made in accordance with the time limitations set forth by the deferral

state agency. 29 CFR § 1601.12(b)(1)(V)(a) (1975). Again, the Court will recall that the plaintiff in the case at bar did not file within the period of limitation of the Michigan Department of Civil Rights.

II.

THE COURT OF APPEALS HAS DECIDED THE QUESTION OF DISCRIMINATION IN A WAY WHICH IS IN CONFLICT WITH TEXAS DEPT OF COMMUNITY AFFAIRS v BURDINE, 450 US 248 (1981) AND U.S. POSTAL SERVICE BOARD OF GOVERNORS v AIKENS, ___ US ___, 75 L ED 2D, 403, 103 S CT 1478 (1983) BY PERMITTING A FINDING OF DISCRIMINATION TO BE AFFIRMED WHEN NEITHER THE DISTRICT COURT NOR THE COURT OF APPEALS FOUND THAT PETITIONER "INTENTIONALLY DISCRIMINATED AGAINST" THE RESPONDENT

The trial court found that respondent's discharge was the product of illegal discrimination based upon his sex. That finding was affirmed by the Court of Appeals. However, neither the District Court or the Court of Appeals made any finding that petitioner "intentionally

discriminated" against the respondent.

> "The 'factual inquiry' in a Title VII case is 'whether the defendant intentionally discrimination against the plaintiff.'" U.S. Postal Service Bd of Governors v Aikens, ___ US ___, 75 L Ed 2d 403, 103 S Ct 1478 (1983).

There is no indication in the decision of the Court of Appeals that the Court followed the criteria as set forth in Texas Dept of Community Affairs v Burdine, 450 US 248, 256 (1981).

> "The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. See McDonnell Douglas, 411 US, at 804-805, 36 L Ed 2d 688, 93 S Ct 1817."

Neither the Court of Appeals nor the District Court followed Burdine or Aikens. Neither opinion suggests that the superiors of Rasimas intentionally discriminated against him. As was stated by Senior District Judge Hoffman:

> "Under Conclusion (6) the District Court describes the type of discrimination which existed among the females who worked under plaintiff, and who were under his supervision. The findings do not point the finger of discriminatory practice against the persons who were superior to Rasimas, i.e., Rosen (Director), McDonald (Administrative Officer in charge of personnel), Nagy (a female Director of the Nursing Home program), and Swietec, known as Caron Bender during the pertinent period involved, (a female mental retardation supervisor 10). The most that can be said with respect to plaintiff's superiors is that (1) they paid too much attention to the complaints of the staff working under Rasimas, and (2) before making the final decision to discharge Rasimas, the superiors did not discuss the Belle Isle incident with Rasimas although, as the District Court noted, there are

> essentially no factual disputes --the differences between Rasimas and his staff were matters of judgment as to whether he should have returned to the Hoover Nursing Home when Donna, the very young child, became ill."
>
> * * *
>
> "The discharge action may have been neither discriminatory nor praiseworthy. The action may have been the result of poor employee relations, but nevertheless not constitute discriminatory treatment." Rasimas v Michigan Dept of Mental Health, 714 F2d at 629 and 631 (1983).

The analysis set forth by Senior District Judge Hoffman is in accord with what this Court set forth in Texas Dept of Community Affairs v Burdine, supra, at 259, where it was said:

> "...the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. The fact that a court may think that the employer misjudged the qualifications of the applicant does not in itself expose him to Title VII liability...."

Accordingly, this Court should grant the instant petition for certiorari. Both the decision of the District Court and the Court of Appeals are in conflict with applicable decisions of this Court since they do not utilize the appropriate standard of "intentional discrimination" by the supervisors of the employee before concluding that there was illegal discrimination by petitioner, Michigan Department of Mental Health.

III.

THE DECISION OF THE COURT OF APPEALS OF THE SIXTH CIRCUIT THAT UNEMPLOYMENT BENEFITS SHOULD NOT BE DEDUCTED ON BACK PAY AWARDS IS IN CONFLICT WITH THE DECISION OF OTHER FEDERAL COURTS OF APPEALS

The District Court found that petitioner failed to mitigate his damages and, accordingly, made no further findings as to the amount of damages. The parties in the Courts below did not

address the question as to whether the District Court should or should not exercise its discretion in deducting unemployment benefits received by respondent from any award of damages. Nonetheless, the Court of Appeals stated:

> "Unemployment benefits also should not be deducted from back pay awards." Rasimas v Michigan Dept of Mental Health, 714 F2d 614, 627 (1983).

Whether unemployment benefits should be deducted from an award of back pay, if an award of back pay is ultimately granted, should be left to the sound discretion of the trial court. The ruling by the Court of Appeals has precluded the exercise of that discretion. The decision in this regard is in conflict with the decisions of the Courts of Appeals of the Second Circuit, Seventh Circuit, the Fifth Circuit and of other panels of the Sixth Circuit.

> "This Court finds that deductions for unemployment compensation benefits avoids any possibility of a double payment to a plaintiff, and, in any case, such a decision is within the discretion of the trial judge. See Satty v Nashville Gas Co., 522 F2d 850, 855 (6th Cir, 1975), aff'd in part and vacated in part, 434 US 136, 98 S Ct 347, 54 L Ed 2d 356 (1977); Bowe v Colgate-Palmolive Co., 416 F2d 711, 721 (7th Cir, 1969)." Merriweather v Hercules, Inc., 631 F2d 1161, 1168 (5th Cir, 1980).

See also, Grant v Bethlehem Steel Corp, 622 F2d 43, 47 (2nd Cir, 1980) and Boich v Federal Mines Safety and Health Review Comm'n, 704 F2d 275, 287 (6th Cir, 1983). Compare Equal Employment Opportunity Comm'n v Enterprise Association's Steam Fitters Local 638, 542 F2d 579, 591-92 (2nd Cir, 1976), cert den 430 US 911, 97 S Ct 1186, 51 L Ed 2d 588 (1976) where the reasons for allowing deductions from a back pay award were enunciated. Those reasons can be summarized as follows: (1) Where the contributions to the fund from

which the benefits derive are made solely by the defendant, the collateral source rule does not apply; (2) the plaintiff would otherwise receive a double recovery; (3) the defendant would otherwise in effect be subjected to punitive damages. Petitioner notes that in the case at bar, petitioner is the Michigan Department of Mental Health, or in other words, the State of Michigan itself. By virtue of the ruling of the Court of Appeals in the case at bar, the petitioner may be required to pay unemployment compensation benefits and general assistance benefits in addition to back pay. The State under such circumstance is being subjected to punitive damages while the respondent receives a double recovery.

As was stated by Senior District Judge Hoffman in his dissent in the case at bar:

> "...the majority in the instant case is changing the discretionary rule vested in District Judges contrary to the Supreme Court in Gullett Gin Co [NLRB v Gullett Gin Co, 340 US 361, 364 (1961)] and the Sixth Circuit in Satty [supra]." 714 F2d at 632.

The Supreme Court has not directly settled this important question. Petitioner submits that this Court should settle this important question of federal law as to whether the trial court should exercise its discretion in deciding whether unemployment insurance benefits should be deducted from any award of back pay in a Title VII case.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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Dated: January 30, 1984

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAVID L. RASIMAS,

Plaintiff,

v

Case No.
77-71696

MICHIGAN DEPARTMENT OF
MENTAL HEALTH,

Defendant.

JUDGMENT

At a session of said court, held in the Federal Building, Bay City, Michigan on September 16, 1980

PRESENT: HONORABLE JAMES HARVEY
United States District
Judge

For the reasons set forth in the Memorandum Opinion and Order issued this date;

IT IS ORDERED AND ADJUDGED that the plaintiffs take nothing, and that the

action be dismissed on the merits. Each party is to pay its own costs of action.

s/
JAMES HARVEY
United States District
Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAVID L. RASIMAS,

Plaintiff,

v

Case No.
77-71696

MICHIGAN DEPARTMENT OF
MENTAL HEALTH,

Defendant.

MEMORANDUM OPINION AND ORDER

At a session of said court, held in the Federal Building, Bay City, Michigan on September 16, 1980

PRESENT: HONORABLE JAMES HARVEY
United States District
Judge

This action was brought under Title VII of the Civil Rights Act of 1964, as amended, 42 USC 2000e, et seq. Plaintiff herein claims that he was discriminatorily discharged from his job with the Michigan Department of Mental Health, on

account of his sex. This case was tried before the Court, without a jury, commencing August 20, 1980 and concluding September 3, 1980. Based upon the evidence adduced at trial, and upon a thorough review of the record, the Court hereby sets forth its Findings of Fact and Conclusions of Law pursuant to FR Civ P 52(a).

FINDINGS OF FACT

A. BACKGROUND

1.) Plaintiff David L. Rasimas is a 39 year old white male, currently residing in Warren, Michigan. (Stipulated Fact; testimony of Rasimas)

2.) After graduating from high school, plaintiff served for three years in the Army, from 1960 to 1963. During his service in the Army, plaintiff attained the rank of Specialist Fourth Class, and received training as a Medical

Corpsman, and as a Surgical Technician. (Testimony of Rasimas; Exhibit #17)

3.) After his discharge from the Army, plaintiff worked at various hospitals and clinics in health service related positions, while pursuing his education. (Testimony of Rasimas)

4.) In 1970, plaintiff received an Associate's Degree from Highland Park Community College. In 1972, plaintiff was granted a Bachelor of Arts Degree in psychology from Shaw College in Detroit. Since that time, plaintiff has done some post-graduate work in psychology at the University of Michigan, Dearborn campus. (Testimony of Rasimas; Exhibit #17)

5.) Plaintiff was employed by the Michigan Department of Mental Health, as an Activities Training Aid 05 at the Northville Residential Training Center from August 13, 1972 until May 18, 1975. (Stipulated Fact)

6.) On May 18, 1975, plaintiff was promoted to the position of Mental Retardation Program Supervisor 10 (hereinafter supervisor 10), and reassigned to the Macomb Oakland Regional Center (hereafter MORC). (Stipulated Fact)

7.) At the time of plaintiff's employment at MORC, Caron Bender Swietec was also employed at MORC as a Supervisor 10. Her responsibilities in this position included overseeing and supervising the performance of plaintiff and of other Supervisor 10's at all of the various facilities administered under MORC. (Testimony of Swietec)

8.) During the time of plaintiff's employment at MORC, Caron Bender Swietec reported to Janet Nagy, who held the position of Director of Nursing Programs at MORC, covering three separate institutions. (Testimony of Nagy)

9.) During the time of plaintiff's

employment at MORC, Maynard McDonald held the position of Administrative Officer for MORC, and had full responsibility for all matters relating to personnel. (Testimony of McDonald)

10.) Plaintiff initially interviewed with Caron Bender Swietec and Janet Nagy, both of whom recommended him to Maynard McDonald, who approved the hiring of plaintiff. (Testimony of Swietec, Nagy and McDonald)

11.) While employed by MORC, plaintiff worked at the Hoover Nursing Home, a separate facility affiliated with MORC. (Testimony of Swietec)

12.) Plaintiff's responsibilities as a Supervisor 10 included working with children who are mentally retarded and developmentally disabled and supervising staff personnel who also carry out the therapeutic program being provided to the children. (Testimony of Caron Bender Swietec and Janet Nagy)

13.) At the time of his hiring for the Supervisor 10 position at MORC, Swietec, Nagy and McDonald were all aware that plaintiff had no prior supervisory experience, but believed that he would be able to gain the necessary supervisory skills through experience on the job and through instruction which could be provided him. (Testimony of Swietec, Nagy and McDonald)

B. Plaintiff's Employment at MORC

14.) At an initial orientation meeting between plaintiff and Swietec, plaintiff's job responsibilities were discussed, and plaintiff was informed that there were some problems with the Hoover Home staff, which required corrective action. These problems were later discussed in greater detail, and included such matters as an excessive number of personal phone calls by the staff during working hours, neglect by

the staff of established working hours and failure to observe proper channels for communicating with Nagy and MORC Director David Rosen. (Testimony of Rasimas and Swietec; Exhibit #1)

15.) Pursuant to these discussions, plaintiff prepared memos to all staff members, and posted them in a staff office. The memos outlines the procedures to be observed and directed all staff members to read and initial. These memos were initialed and also defaced with miscellaneous graffiti, although it is not clear whether the graffiti was the product of staff members or resident-patients. (Testimony of Rasimas; Exhibits #8, #9, #10, and #11)

16.) The relationship between plaintiff and plaintiff's staff was fraught with difficulties at an early stage. Swietec noted problems in this area as early as June 5, 1975, and over the

next few days thereafter conferred separately with plaintiff's staff in an attempt to clear up the situation. (Testimony of Swietec; Exhibit #1)

17.) Plaintiff began to feel that his staff was hostile towards him, and reported to Swietec that his staff did not appear to be responding to his directives. (Testimony of Rasimas and Swietec; Exhibit #1)

18.) Members of plaintiff's staff observed that their relationship with plaintiff was "not the best" or even "strained." Staff members complained to Swietec and Nagy that plaintiff was insensitive to their needs and functions. Staff members felt that plaintiff was interfering with the performance of their duties and they disapproved of his methods of handling the children. (Testimony of Wittmer, LaFrate, Swietec and Nagy)

19.) Nagy met with the plaintiff on three or four occasions to counsel him regarding problems he was experiencing. At one point, Nagy told the plaintiff, in Swietec's presence, "The girls are out to get you." (Testimony of Rasimas, Nagy and Swietec)

20.) Swietec believed that plaintiff's staff was unaccustomed to close supervision and was likely to react negatively to anyone in plaintiff's position. (Testimony of Swietec)

21. Swietec never held meetings with plaintiff and disgruntled staff members together, but met on several occasions with staff members, in plaintiff's absence, to discuss complaints against plaintiff. (Testimony of Rasimas and Swietec)

22.) On various occasions when similar problems arose involving staff members and plaintiff's predecessor in

office, Lucy Bosio, Swietec had held meetings with Bosio and the complaining staff members together. (Testimony of Swietec)

23.) At one point, on June 25, 1975, Swietec noted that it seemed to her that "about half" of the staff's complaints against plaintiff were unwarranted, and that the staff appeared to be attempting to use plaintiff as a "scapegoat." (Exhibit #1, p. 45)

24.) Swietec also felt that plaintiff needed to improve his listening skills in dealing with his staff. (Testimony of Swietec; Exhibit #1)

25.) Nagy began, sometime in June of 1975, to receive complaints directly from staff members, and in response, she met on several occasions with plaintiff to counsel him on methods of resolving his problems with the staff. Nagy observed that plaintiff seemed receptive to her

suggestions, but did not appear able to make progress towards solving the problems. She ultimately concluded that plaintiff was not a satisfactory supervisor. At sometime near the end of June, she determined that a "written counselling," that is, a written critique of plaintiff's job performance, was appropriate. She directed Swietec to prepare such a critique, and this was done in the form of a memo dated July 1, 1975. (Testimony of Nagy, Exhibit #1, pp 17-19)

26.) In addition to problems relating to communicating and maintaining good relations with his staff, the counselling memo described shortcomings relating to: (a) the exercise of good judgment in assuring the safety of resident-patients as illustrated by plaintiff's allowing a resident-patient to be transported in a van without a fastened seat belt; (b) the inability to effective-

ly implement supervisory directives in enforcing rules and policies applicable to his staff, e.g., the schedule of working hours; and (c) failing to take proper notes at a behavorial conference in order to disseminate information to his staff. (Exhibit #1, pp 17-19)

27.) The contents of the counselling memo were reviewed with plaintiff by Nagy and Swietec. Swietec noted that plaintiff seemed confused about the purpose of the meeting. (Testimony of Nagy and Swietec)

28.) Neither nagy nor McDonald believed that the criticisms contained in the counselling memo of July 1, 1975 were grounds for terminating the plaintiff at that time. (Testimony of Nagy and McDonald)

29.) On Saturday, July 12, 1975, plaintiff and three members of his staff took four resident-patients of the Hoover

on a pre-arranged trip to Belle Isle in a van. Somewhere near the mid-point of the trip, one of the resident-patients began to vomit. One of the staff attendants, Deborah LaFrate, described the child's condition as characterized by seizures and trembling, with incipient cyanosis about the edges of the mouth, and repeated vomitting. Plaintiff, who was driving the van, was informed of the child's distress, whereupon he pulled into a nearby parking lot and examined the child. Plaintiff satisfied himself that the child's pulse was normal, and that she was breathing well. The child had stopped vomitting by this time. Plaintiff concluded from his examination that the child was suffering from "motion sickness," and that the episode was not serious. LaFrate and another staff member stated their disagreement with plaintiff's assessment of the situation,

and strongly urged that medical attention be sought, either by returning to Hoover Nursing Home or by availing themselves of one of the hospital facilities near where they were at the time. Notwithstanding, plaintiff made a determination to continue the trip. Plaintiff believed that all the child required was rest, which could be provided to her at Belle Isle, without entailing any more driving than would be necessitated by a return to the Home, and without disrupting the outing for the other children. (Testimony of LaFrate and Rasimas)

30.) Upon arriving at Belle Isle, the sick child was allowed to lay down on a blanket under a tree and a staff attendant was directed by plaintiff to remain with her. The other members of the party proceeded to have a picnic lunch nearby and afterwards to tour the Belle Isle Children's Zoo. Altogether,

the party was on Belle Isle for somewhat less than an hour. Prior to boarding the van to return to Hoover Nursing Home, LaFrate observed that the sick child appeared pale and lethargic but was no longer vomitting or experiencing seizures. On the way back, plaintiff stopped at a restaurant and bought some giger ale for the sick child who had not eaten lunch with the others. The return trip took approximately 30 minutes. (Testimony of LaFrate and Rasimas)

31.) Plaintiff directed a staff attendant to take the sick child to a nurse on duty at Hoover Nursing Home immediately upon arriving there. The nurse examined the child, but deemed it unnecessary to call a doctor. (Testimony of LaFrate and Rasimas)

32.) One of the members of the Hoover Nursing Home nursing staff approached Marilyn Wittmer, a member of

plaintiff's staff, on Monday, July 14, 1975, and informed her of what she knew about the trip to Belle Isle. Wittmer thereupon contacted Swietec at her office and requested her to come to Hoover Nursing Home and hold a meeting with the staff members who were on the Belle Isle trip. Swietec contacted the staff members from tre teip and directed them to submit written reports of their version of what had happened. Swietec also contacted Nagy, who in turn contacted McDonald. McDonald conferred with LaFrate by telephone to get her side of the story. (Testimony of Wittmer, Swietec, Nagy and McDonald; Exhibit #1, pp 11-15)

33.) Both Nagy and Swietec recommended to McDonald on July 14, 1975 that plaintiff be dismissed. (Testimony of Swietec and Nagy)

34.) The ultimate decision to terminate the plaintiff was made by Maynard McDonald on July 14, 1975. (Testimony of McDonald)

35.) McDonald, in a letter dated October 22, 1975, stated the factors he had taken into consideration in making the decision on plaintiff's dismissal. This letter was written at the request of the Michigan Civil Service Commission, for the purpose of the Step 4 Hearing pending at that time. McDonald listed the following four factors:

a) failure to maintain good relationships with program staff and Hoover Nursing Home staff;

b) failure to follow supervisory instructions;

c) failure to provide adequate precautions for the health and safety of residents; and

d) failure to demonstrate progress

in ability to satisfactorily supervise and administer the Nursing Home Program.

The letter also listed several examples of the deficiencies noted, and concluded with a few observations on why plaintiff should have done better. (Testimony of McDonald; Exhibit #29)

36.) Plaintiff was on his day off on July 14, 1975, and did not learn of the reports against him concerning the Belle Isle Trip until the following day, July 15, 1975. (Testimony of Rasimas)

37.) On Tuesday, July 15, 1975, plaintiff was called into a meeting with McDonald and Swietec. At that time, he was informed of the reports against him and given the option to resign or be fired. He was allowed some time to consider this option while he made preparations to leave. He reported later to McDonald that he would prefer to resign,

and signed an employee departure report with the annotation "signed under protest" next to his signature. (Testimony of Rasimas, Swietec and McDonald; Exhibit #1, p 10)

38.) After July 15, 1975, plaintiff performed no further services and earned no further compensation from MORC. (Testimony of Rasimas, McDonald and Pouch)

C. The Civil Service Grievance Process

39.) On July 28, 1975, plaintiff filed a Grievance Procedure Form CSG-1 with the Michigan Civil Service Commission. (Exhibit #27)

40.) In accordance with what the Michigan Civil Service Commission calls "Step 3" of the grievance procedure, plaintiff met with John Pouch, Assistant Personnel Director for the Michigan Department of Mental Health, on August 7, 1975. The outcome of their conference

was that plaintiff's dismissal was affirmed. (Testimony of Pouch; Exhibit #28)

41.) Plaintiff appealed the outcome of the Step 3 conference to the Step 4 level, at which a hearing was held before Hearing Officer Richard J. Meyers on October 16, 1975, and on November 21, 1975. The decision of the Hearing Officer, issued on February 6, 1976, found that plaintiff was removed from the Supervisor 10 position for good cause, but that dismissal was an overly harsh action. The decision recommended that plaintiff be reinstated, and demoted to the position of an Activities Training Aide, 05 and placed on the layoff register until an opening arose at that position. The decision also recommended that plaintiff be denied any backpay. (Exhibit #4)

42.) Pursuant to the Hearing Officer's recommendation, administrative action was taken to reinstate, demote, and lay off plaintiff. This was essentially a paperwork transaction and plaintiff was not given notice of it, aside from the Hearing Officer's recommendation and the Civil Service Commission's decision. (Testimony of McDonald, Exhibit #1)

43.) Upon appeal of the Hearing Officer's decision to Step 5, the Michigan Civil Service Commission met and heard oral argument by John Pouch, representing the Michigan Department of Mental Health, and Philip Helms, a Staff Representative from AFSCME Council 11, representing plaintiff. On March 18, 1977, based upon this hearing, the Commission affirmed the Hearing Officer's decision and adopted his recommendation. (Exhibit #5)

44.) No representations were made to plaintiff by members of the Michigan Civil Service Commission regarding when his termination would be deemed "final." (Testimony of Rasimas)

D. Mitigation of Damages

45.) By letter dated April 20, 1976, Swietec requested that plaintiff report for an interview for a position as an Activities Training Aid 05. There was an impending opening at that position at MORC, and according to Civil Service rules, the position had to be offered to the plaintiff, as long as he was on the lay-off register, before a new employee could be hired to fill it. (Testimony of McDonald and Rasimas; Exhibit 1, p 3)

46.) No opening was available at MORC for an Activities Training Aid 05 between February 6, 1976, and April 30, 1976. (Testimony of McDonald)

47.) The letter plaintiff received was a standard form letter requesting an interview, and did not inform him of the actual availability of the position, nor of plaintiff's right of first refusal regarding the position. (Testimony of McDonald and Rasimas)

48.) By letter dated April 30, 1976, plaintiff declined the interview, citing as his reason the pendency of his complaint against MORC for dismissing him. (Exhibit #1, p 3)

49.) Subsequent to April 30, 1976, the plaintiff has received no offer of employment, although he continues to interview and seek other employment in both the governmental and private sectors. He remains unemployed and dependent upon public assistance, to this date. (Testimony of Rasimas)

50.) If plaintiff had retained his job as a Supervisor 10 from July 15,

1975, to date, he would have earned $81,173.12. (Stipulated Fact)

51.) Had plaintiff accepted the available position of Activities Training Aid 05, as of April 30, 1976, and continued in that position to date, he would have earned $54,249.36. (Testimony of McDonald, Exhibit #31)

E. Plaintiff's Civil Rights Charges

52.) On March 16, 1976, while his Civil Service grievance was still pending, plaintiff went to an office of the Michigan Department of Civil Rights (MDCR), where he filled out a preliminary informational form, and met with a representative of the Department to discuss filing a civil rights complaint against MORC for his dismissal. (Testimony of Rasimas; Exhibits #20 and #21)

53.) Also on March 16, 1976, plaintiff went to an Office of the Federal Equal Employment Opportunity Commission

(EEOC) where he signed an affidavit complaining of his dismissal from MORC. The next day a formal charge was typed out and signed by plaintiff. (Testimony of Rasimas; Exhibits #18 and #19)

54.) A formal complaint was typed out by the MDCR, and on June 23, 1976, the complaint was signed by the plaintiff and notarized. (Exhibit #23)

55.) Plaintiff is aware of no further action taken by the MDCR in this matter. (Testimony of Rasimas)

56.) On June 7, 1976, the EEOC commenced investigation of plaintiff's charge, and on April 7, 1977, the EEOC issued a Notice of Right to Sue Within 90 days. (Exhibit #6)

57.) Plaintiff received his Right-to-Sue letter on April 12, 1977. (Testimony of Rasimas; Exhibit #25)

58.) Plaintiff filed an action in the United States District Court for the

Eastern District of Michigan on July 11, 1977. (Plaintiff's Complaint)

CONCLUSIONS OF LAW

1.) Michigan is a deferral state, 29 CFR 1601.74, and therefore a prerequisite for filing a Title VII action in this case was the filing of a charge with the EEOC within 300 days after the alleged unlawful employment practice occurred. 42 USC 2000e-5(e). Mohasco Corp v Silver, 48 LW 4851 (Supreme Court, June 23, 1980); Alexander v Gardner-Denver Co, 415 US 36, 47 (1974).

2.) The date upon which the alleged unlawful employment practice occurred was July 15, 1975, for the purposes of commencing the running of the 300-day period. 42 USC 2000e-5(e). The alleged unlawful action was the discharge itself, which was accomplished in one day. Bonham v Dresser Industries Inc, 569 F2d

187, 191-92 (CA 3, 1977), cert denied 439 US 821 (1979). No continuing violation has been shown to exist. United Air Lines Inc v Evans, 431 US 553, 558 (1977); Geromette v General Motors Corp, 609 F2d 1200, 1203 (1979). Although plaintiff has argued strenuously that plaintiff's discharge was not final for purposes of commencing the 300-day limitation period, until he had exhausted his remedies under the Michigan Civil Service grievance procedures by obtaining a final determination at the Step 5 level, nontheless the Court must decline to accept this view of the law. The Court finds the instant case to be factually indistinguishable from the cases of International Union of Electrical Radio & Machine Workers AFL-CIO Local 790 v Robbins & Myers Inc, 429 US 229 (1976), and Everson v McLouth Steel Corp, 586 F2d 6 (CA 6, 1978). The case cited by plaintiff in

support of his position on this issue, Bethel v Jefferson, 589 F2d 631 (CA DC, 1978), appears to the Court to rest on factual considerations not present in the instant case.[1] Further, plaintiff has alleged no facts which would justify the tolling of the 300-day period on equitable grounds. Cf, Leake v University of Cincinnati, 605 F2d 255 (CA 6, 1979); Fox v Eaton Corp, 615 F2d 716 (CA 6, 1980).

3.) The 300-day period which commenced on July 15, 1975, expired on May 10, 1976. Although plaintiff had initiated contact with the EEOC on March 16,

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[1] The Court in Bethel found that, "(w)hile board's recommendation was under review by the Mayor, Bethel remained suspended but still a member of the Force." 589 F2d at 635. Further, it was there found that "(a)ppellants challenge as discriminatory not only the incidents antedating the convening of the trial boards but also the trial board proceedings themselves and the punitive measures ensuing therefrom, which allegedly were precipitated by the earlier incidents." 589 F2d at 636.

1976, no filing which would be effective for purposes of the 300-day limitation could have occurred prior to May 15, 1976, when the 60-day period during which the civil rights charge was deferred to the Michigan Department of Civil Rights, terminated. 42 USC 2000e-5(c); Mohasco Corp v Silver, supra. Therefore, the plaintiff has not made a timely filing with the EEOC and his claim under Title VII is barred.[2]

4.) Except as noted above, this case comes within the original jurisdiction of this Court. 42 USC 2000e-5(F)(3)

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[2]The issue of timely filing with the EEOC was not raised until immediately prior to trial, and the Court also noted that this area of the law is one in which substantial unsettling changes have recently occurred (see e.g., Mohasco v Silver, supra). Therefore, it was decided to proceed to trial and to make as complete a record as possible in the event of an appeal.

5.) The provisions of 42 USC 2000e-2(a)(1) prohibiting discrimination in employment based upon the employees' sex apply with equal force and on the same terms to discrimination against white males as they do to discrimination against women or ethnic minorities. Hicks v ABT Associates Inc, 572 F2d 960 (CA 3, 1978); Diaz v Pan American World Airways Inc, 442 F2d 385 (CA 5, 1971).

6.) Plaintiff has established a prima facie case of sexual discrimination by showing that:

a) he was employed by the defendant after having been initially found to be qualified for the position of Supervisor 10;

b) plaintiff was a male in an environment where his staff was all female, his predecessor was female, his immediate supervisor was female, and her immediate supervisor was also female;

c) plaintiff was discharged from his position; and

d) after plaintiff's discharge, defendant sought and hired a replacement for plaintiff, and the replacement also was female.

McDonnell Douglas Corp v Green, 411 US 792, 802 (1973). Although the exact elements of the prima facie case under Title VII were described somewhat differently in the McDonnell Douglas case,[3] the

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[3]The exact terms of the McDonnell Douglas test are as follows: "(i) that (plaintiff belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 US at 802. In another case, where the alleged discriminatory action was discharge of an employee, rather than rejection of a prospective employee as in McDonnell Douglas, a prima facie case formulation more similar to the one used in the instant case was devised. See, Vaughn v Westinghouse Electric Corporation, 471 F Supp 281, 284 (ED Ark, 1978).

Court there expressly recognized that:

> "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing fact situations." Id, at 802, n. 13

The purpose of the prima facie case established by McDonnell Douglas is simply to require that the plaintiff carry the burden initially of:

> "showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act.' 421 US at 358" Furnco Construction Corp v Waters, 438 567, 576 (1978).

Because cases under Title VII, in which the claim is disparate treatment of an individual, require an inherently difficult assessment of individual motivations and prejudice (assuming the

defendant does not unabashedly admit bigotry), the courts have allowed plaintiffs to benefit from circumstantial evidence, by indulging in a presumption that adverse treatment of a member of a disadvantaged minority is the product of an illegel discriminatory motive, where no objectively verifiable legitimate motive can be shown. This presumption, in the case of Blacks, Hispanics, and other economically disadvantaged ethnic minorities who have historically been victims of oppression by dominant majority ethnic groupds, or in the case of women, who, at least in some spheres, have historically been denied opportunities available to men, is rationally defensible, and understandable in commonsense terms. However, in the case of a white male, not a member of any readily identifable ethnic minority, common sense may balk at a presumption that adverse

treatment of him is the result of an illegal discriminatory motive, even where that treatment is at the hands of the opposite sex, and even where there is no objectively verifiable legitimate motivation. Simply put, the difficulty is this: why should anyone presume that women would treat a man less favorably than another woman? The historical context of discrimination of this sort is not as readily apparent as that of discrimination against Blacks or women.

Nonetheless, the Court deems that an inference of sexual discrimination can be drawn from the facts constituting the prima facie case described above. The same sexual role stereotypes that have caused women to be channeled either away from the job marketplace altogether, or into lower-paying jobs than men, necessarily have their counterparts in male sexual role stereotypes. Thus, as women

are stereotypically expected to be sexually passive or submissive, men are, according to stereotypes, expected to be agressive and dominant. Further, as women are sterotypically expected to be less suited to the business world and more suited to domestic roles, similarly men are stereotypically expected to be better in business related roles and less suited for domestic roles. In other words, hypothetically, a woman reacting to a man in a stereotypical manner would be more inclined to view him as insensitive to children than she would viewing another woman in the same circumstances.

Based upon the evidence adduced at trial, the Court believes that the plaintiff in this case was victimized by exactly such a stereotypical view.

7.) Defendants have "articulate(d) some legitimate, non-discriminatory reason," for plaintiff's dismissal.

Furnco Construction Corp v Waters, supra. They have adduced evidence tending to support four major criticisms of plaintiff's performance:

(a) he failed to maintain good relationships with his staff;

(b) he failed to satisfactorily implement supervisory directives;

(c) he failed to take adequate precautions for the health and safety of the resident-patients under his supervision; and

(d) he failed to make adequate progress in developing the skills necessary in his position.

8.) Plaintiff has successfully rebutted the presumption that these articulated reasons for his dismissal were the actual reasons, by discrediting them by reference to the facts.

All of the four major reasons articulated by the defendant were made the

subject of the counselling memo dated July 1, 1975. Swietec, Nagy and McDonald all testified that at that point in time there were not adequate grounds for dismissing the plaintiff. Yet within 15 days of that date, all three had changed their minds and decided that plaintiff should be dismissed.

The Court can find only one event which reasonably could be supposed to have effected such a significant change. That event was the Belle Isle trip which immediately preceded plaintiff's dismissal. Based upon its review of the evidence the Court must conclude that the events relating to the Belle Isle trip of July 12, 1975, could only constitute a pretext for some as yet undisclosed reason for plaintiff's dismissal. Briefly summarized, the only charge which could be laid against plaintiff, based upon the Belle Isle incident, was that he

exercised poor judgment in looking after the safety and well-being of a sick child. Yet, the evidence discloses that the only persons with first-hand knowledge of the facts upon which plaintiff's judgment was questioned, aside from plaintiff himself, were three members of his staff, with which he admittedly had an unhappy relationship. Plaintiff's superiors, dependent upon second-hand information for their knowledge of what occurred on the Belle Isle trip, consulted with plaintiff's staff, all female, to ascertain their version of the incident, but unaccountably failed to consult with plaintiff to ascertain his side of the story, before deciding to dismiss the plaintiff from his employment. This would appear to be a further extension of the practice, admitted by Swietec, of always discussing staff complaints against plaintiff, with either

plaintiff alone, or with staff members without plaintiff present. This practice was not used with plaintiff's predecessor.

In order for such an incident to constitute a legitimate non-pretextual reason for discharging an employee, some substantial Good-faith effort towards obtaining an unbiased account of what actually transpired would have to be shown. The facts of this case indicate that no such effort was made.

9.) Plaintiff's discharge on July 15, 1975, was the product of illegal discrimination based upon his sex. 42 USC 2000e-2(a)(1).

10.) Plaintiff ailed to make reasonably diligent efforts to obtain other employment, to mitigate his damages, by refusing to accept the interview offered by Swietec for the position of Activities Training Aid 05, on April 20, 1976. 42

USC 2000e-5(g); Sias v City Demonstration Agency, 588 F2d 692 (CA 9, 1978).

11.) Upon consideration of all the circumstances, the Court, in its discretion, finds that neither party is entitled to an award of attorney's fees. 42 USC 2000e-5(k).

Conclusion

Based upon its finding that plaintiff did not make a timely filing with the EEOC prior to commencing this case, plaintiff's case must be dismissed with prejudice.

s/
JAMES HARVEY
United States District Judge

RECOMMENDED FOR FULL-TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 80-1735-6

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DAVID L. RASIMAS,
Plaintiff-Appellant,
Cross-Appellee,

v.

MICHIGAN DEPARTMENT OF MENTAL HEALTH,
Defendant-Appellee,
Cross-Appellant.

ON APPEAL from the District Court for the Eastern District of Michigan.

Decided and Filed July 28, 1983.

Before: KEITH and JONES, Circuit Judges, and HOFFMAN,* Senior District Judge.

KEITH, Circuit Judge, delivered the opinion of the court, in which JONES, Circuit Judge concurs. HOFFMAN, Senior District Judge (pp. 25-33) delivered a separate opinion concurring in part and dissenting in part.

KEITH, Circuit Judge. In this sex discrimination action David Rasimas alleged that the Michigan Department of Mental

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* Hon. Walter E. Hoffman, Senior Judge, Eastern District of Virginia, sitting by designation.

Health terminated him from his supervisory position because of his sex. The district court agreed, but found that he had not timely filed this action with the Equal Employment Opportunity Commission ("EEOC"). The court also determined that his refusal to interview for a non-supervisory position with the Michigan Department of Mental Health constituted a failure to mitigate damages. We affirm the sex discrimination finding, but reverse the timeliness and mitigation of damages determinations.

I.

On August 13, 1972, Defendant-appellee Michigan Department of Mental Health ("MDMH") hired Rasimas as a Recreation Activities Training Aide 05 ("Recreation Aide") at their Northville Residential Training Center ("Northville").[1] Northville supervisory personnel later transferred Rasimas from recreation. He became a speech and language classroom instructor.

In the spring of 1975, Rasimas was recommended for promotion by Janet Nagy, Director of Nursing Programs, and Caron Bender Swietec,[2] the supervising Mental Retardation Program Supervisor 10. Nagy, Swietec, and Maynard McDonald, the personnel officer at the Macomb Oakland Regional Center ("MORC"), were aware that Rasimas had no prior supervisory experience and that there were personnel problems at Hoover

[1] Prior to being hired by the Michigan Department of Mental Health, David Rasimas had served in the Army as a medical corpsman and an operating room technician from 1960 to 1963. Rasimas worked as an operating room technician, surgical assistant, intravenous technician, an inhalation therapist, and an emergency technician after leaving the Army. In 1972, Shaw College awarded him a bachelor's degree in psychology.

[2] Caron Bender Swietec was David Rasimas' immediate supervisor although she held the same position, Mental Retardation Program Supervisor 10, as he. The district court's opinion spells Caron Swietec's last name S-W-I-E-T-E-C. The transcript, however, spells her last name S-W-I-A-T-E-K. We have used the spelling contained in the district court's opinion.

Nursing Home.[3] Nevertheless, each was confident that Rasimas could resolve the problems and gain the necessary supervisory skills from management seminars and on-the-job training. On May 18, 1975, McDonald promoted Rasimas to Mental Retardation Program Supervisor 10 ("Supervisor 10") at Hoover Nursing Home.

At an initial orientation meeting, Swietec discussed the functions of a Supervisor 10. She told Rasimas that he was required to manage the therapeutic program which had been developed for the mentally and physically handicapped children at the home. Swietec also identified several personnel problems which required corrective action. These problems included excessive numbers of personal phone calls, neglect of proper working hours, and a failure to observe the proper channels for communicating with Nagy and MORC Director David Rosen.

During the initial period of Rasimas' tenure, Nagy was away on vacation. Swietec consequently, was forced to perform many of Nagy's functions as well as her own. Rasimas meanwhile attempted to fulfill the functions of his position. Following the orientation meeting, he prepared a memorandum addressing the personnel problems Swietec had identified. The memorandum was sent to staff members and posted in the staff office. Staff members read, initialed, and returned the memorandum. Some memorandum were, however, returned defaced with graffiti.[4]

Swietec began receiving complaints concerning the "difficult" relationship between Rasimas and the staff as early as June 5, 1975. Deborah LaFrate, a recreation aide under Rasimas' supervision, disagreed with the memorandum which had been

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[3] Hoover Nursing Home is a private care facility for patients who are mentally and physically handicapped. The staff is under the joint control of the Director of Nursing for Hoover Nursing Home and a Mental Retardation Supervisor 10 from the Macomb Oakland Regional Center.

[4] It is not clear whether the graffiti was the product of staff members or resident patients.

circulated. She believed that there had never been a problem with punctuality, scheduling, or excessive numbers of personal calls. Other staff members alleged that Rasimas was insensitive to their needs and interfered with the performance of their duties.

Rasimas, by contrast, maintained that the staff was hostile and uncooperative.[3] Swietec concurred in Rasimas' assessment, but continued to accept complaints from staff members who had bypassed Rasimas. In the days following June 5, she conferred with Rasimas and the disgruntled staff separately. Swietec did not, however, follow "standard procedure" and conduct joint meetings with Rasimas and his staff. Such meetings had been conducted when similar problems arose for plaintiff's female predecessor.

Nagy was also aware of the all female staff's hostility toward Rasimas. She eventually met with Rasimas on two or three occasions to offer advice. Nagy found Rasimas "receptive to her suggestions." Swietec had a similar reaction, but felt Rasimas' listening skills could be improved.

At one of the June meetings, Nagy told Rasimas, in Swietec's presence, "The girls are out to get you." Swietec agreed. She believed that the females on the Herbert Hoover staff were unaccustomed to close supervision, and would be likely to react negatively to anyone in plaintiff's position. In fact, as late as June 25, 1975, Swietec noted that "about half" of the

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[3] Deborah LaFrate, activities aide 05 on probationary status with less than six months experience, reacted emotionally when Rasimas questioned her about techniques she had recently been taught by Rasimas' predecessor. LaFrate's prior work experience had been in a clothing store.

Marilyn Whitmer, a recreation activities aide 05 under Rasimas' supervision, testified as follows under cross examination:

> Q I'm asking you that if Mr. Rasimas came down with a policy and you did not know whether it was an MORC policy, you wouldn't have followed it, is that right? Is that what you are telling us?
>
> A Well, if I felt it was not an MORC policy, if it was something he was trying to get us to follow and it wasn't what we should be following, no, I would not have followed it.

staff's complaints against Rasimas were unwarranted. She believed the staff was attempting to use Rasimas as a "scapegoat."

Nagy, meanwhile, concluded that Rasimas had not been making sufficient progress and that a written evaluation was appropriate. In a memo dated July 1, 1975, Swietec critiqued Rasimas' performance. The counseling memo described Rasimas' supervisory weaknesses as follows: 1) the exercise of poor judgment in assuring the safety of resident patients; 2) ineffectively implementing supervisory directives to enforce rules applicable to his staff; and 3) failing to take notes and disseminate information acquired at a behavioral conference. Neither Nagy nor McDonald believed that the criticisms contained in the counseling memo of July 1, 1975, constituted grounds for terminating Plaintiff.

On Saturday, July 12, 1975, Rasimas and three staff members took four resident-patients of the Hoover Nursing Home on a pre-arranged trip to Belle Isle. Near the mid-point of the trip, one of the patient-residents began to vomit. LaFrate, a recreation aide on probationary status, stated the child's condition was characterized by trembling, vomiting, and blueness near the edges of the mouth.[6] Rasimas, the driver of the van, pulled into a nearby parking lot and examined the child. He satisfied himself that the child had a normal pulse, was breathing well, and had stopped vomiting. Rasimas concluded that the child was experiencing a non-serious bout of motion sickness. LaFrate and another staff member disagreed and urged that medical attention be sought. Rasimas determined that all the child needed was rest, which could be provided at Belle Isle without disrupting the outing for the other children.

At Belle Isle, Rasimas directed a staff attendant to stay with the sick child while she lay on a blanket. The remainder of

[6] At no time did LaFrate examine the child to determine if her vital organs were functioning abnormally. LaFrate did not have an extensive medical background. In fact, she testified that she had received a little on-the-job medical training from the nursing staff at Hoover Nursing Home.

the party spent the next hour having a picnic lunch and touring the Belle Isle Children's Zoo. Just prior to returning, LaFrate observed that the sick child appeared weak and lethargic.

Rasimas directed a staff attendant to take the sick child to a nurse as soon as they arrived at the Hoover Nursing Home. A nurse examined the child, but deemed it unnecessary to call a doctor.

On Monday, July 14, 1975, a nurse at the Hoover Nursing Home approached Marilyn Whitmer, a recreation aide, and gave her a second-hand account of the Belle Isle trip. Whitmer immediately contacted Swietec and requested that she hold a meeting with the staff members who participated in the Belle Isle trip. Swietec directed staff members to submit written reports describing the trip. Swietec also contacted Nagy, who in turn contacted McDonald. McDonald discussed the trip with LaFrate, the recreation aide who had disagreed with Rasimas' decision to continue the trip.

Nagy did not personally investigate the allegations against Rasimas. Nevertheless, later that afternoon she and Swietec recommended that Rasimas be dismissed. McDonald accepted the recommendations, and summarily terminated Rasimas. At no time prior to, or during July 14, had Rasimas been consulted concerning the events of the Belle Isle trip. In fact, July 14 was Rasimas' day off. He did not learn of the reports against him until the day after the termination decision had been made.

On July 15, 1975, Rasimas met with McDonald and Swietec. He was informed of the reports against him and given the option to resign or be fired. He was, however, given a few hours to consider these options and make preparations to leave. Later, Rasimas resigned and signed an employee departure report with the annotation "signed under protest".

Rasimas began looking for other employment. A short time after the termination MDMH paid Rasimas for pension contributions, accumulated sick leave, and accumulated vacation

leave. MDMH hired Lynn VanBundy, a female, to replace Rasimas.

On July 28, 1975, Rasimas filed a grievance with the Michigan Civil Service Commission. On August 7, 1975, a meeting was held pursuant to Step 3 of the Michigan Civil Service Commission grievance procedure. The dismissal was affirmed.

Rasimas appealed the decision to the Step 4 level. On October 16, 1975, a hearing was held before a hearing officer. Subsequently, the Michigan Civil Service Commission directed McDonald to list the factors which caused him to terminate Rasimas. In a letter dated October 22, McDonald identified the following four factors: 1) the failure to maintain good relationships with program staff and Hoover Nursing Home staff; 2) the failure to follow supervisory instructions; 3) the failure to provide adequate precautions for the health and safety of residents; and 4) the lack of adequate progress in acquiring supervisory skills. On November 21, 1975, an additional hearing was conducted. On February 6, 1976, the hearing officer found that Rasimas was terminated for good cause, but that the dismissal was an overly harsh action. The Hearing Officer's decision recommended that backpay be denied, and Rasimas be demoted to recreation aide. It further provided that he be placed on the layoff register until an opening occurred. Rasimas appealed the Hearing Officer's decision. He was not notified that MDMH had implemented the Hearing Officer's recommendations.

On March 16, 1976, he filed a complaint against MDMH with the Michigan Department of Civil Rights.[7] The next day he signed the formal charge prepared by the Equal Employment Opportunity Commission.

On April 20, 1976, Swietec sent Rasimas a form letter asking him to interview for a recreation aide position. The form letter did not inform him of the actual availability of the posi-

[7] The Michigan Department of Civil Rights is a deferral agency. See 29 C.F.R. § 1601.74.

tion, or of his right of first refusal regarding the position. In a letter dated April 30, 1976, Rasimas declined to interview, citing his pending complaint against MORC for dismissing him.

Rasimas continued his efforts to obtain substantially equivalent employment. In fact, he attended several interviews, took employment examinations, and sought employment with government agencies, hospitals and private clinics. One of the examinations Rasimas passed qualified him to become a paramedic with the Detroit Emergency Medical Service.[8] Despite these efforts Rasimas was unable to obtain suitable employment. Rasimas' only source of income prior to trial was unemployment compensation and later, general assistance payments from the state.

On March 18, 1977, the Commission affirmed the Hearing Officer's decision. A few weeks later, on April 7, the EEOC issue a "notice of right to sue" letter. On July 11, 1977, Rasimas filed the present sex discrimination action in the United States District Court for the Eastern District of Michigan.

On August 20, 1980, a bench trial was conducted. The court found that 1) the action was timely filed with the EEOC; 2) Rasimas' termination was the result of sex discrimination; and 3) that Rasimas failed to mitigate his damages when he refused to interview for the activities aide position. Rasimas and MDMH each appeal that portion of the district court's opinion adverse to their position.

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[8] In 1980, Rasimas passed the emergency medical service examination. Subsequently, he was placed on the register to become a paramedic in Detroit.

II.

Timeliness:

The timely filing of a complaint with the EEOC is a procedural prerequisite to the enforcement of a Title VII action in federal court. This requirement, however, is not jurisdictional, rather it is in the nature of a statute of limitations. *See Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), *reh'g denied, Independent Federation of Flight Attendants* v. *Trans World Airlines, Inc.*, 456 U.S. 940 (1982). A charge of discrimination should be filed with the EEOC within 180 days after the last discriminatory act. 42 U.S.C. § 2000e-5(e).[9] However, in deferral states, states with fair employment agencies, claimants must file charges with the state agency before pursuing their claims with the EEOC. 42 U.S.C. § 2000e-5(c).[10] The EEOC will not formally file

[9] 42 U.S.C. § 2000(e)-5(e) states:

(e) Time for filing charges. A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

[10] 42 U.S.C. § 2000(e)-5(c) states:

(c) State or local proceedings. In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a)[(b)] by the person aggrieved before the expiration of sixty days after proceedings

charges it has received until after the state agency has terminated its proceedings or sixty days have elapsed, whichever occurs earlier. *Mohasco Corp.* v. *Silver*, 447 U.S. 807 (1980). In deferral states all complaints must be filed with the EEOC within 300 days after the act of discrimination or within thirty days after receiving notice that the state has terminated its proceedings. 42 U.S.C. § 2000e-5(e).

In the present case, MDMH argues that the present action is untimely without regard to whether the 180 day filing period or the 300 day filing period applies. MDMH acknowledges that Rasimas initiated complaints at the EEOC and the Michigan Civil Rights Commission ("Commission") on March 16, 1975, some 244 days after the termination. MDMH points out, however, that the Commission lacks jurisdiction over complaints filed more than ninety days after the discriminatory act. Mich. Comp. Laws Ann. § 423.307(b). On March 16, the Commission did not have the "authority to grant or seek relief" from the alleged discriminatory practice as required by 42 U.S.C. § 2000e-5(e). Consequently, MDMH argues the 300 day limitation period which is available when a deferral agency may grant relief simply does not apply to the instant case. The 180 day limitation period applies since the tardy filing deprived the Commission of its opportunity to consider the complaint. We disagree.

The EEOC's position is that a complaint need not be timely filed under state law before the claimant can benefit from the 300 day federal filing period. 29 C.F.R. § 1601.13(a)(3)

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have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(1981). The EEOC's position is entitled to great deference. *See Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34 (1971). More importantly, the Supreme Court has summarily reversed and remanded two circuit court opinions which held that in deferral states the 300 day filing period was only available where the action had been filed with the state deferral agency within 180 days of the discriminatory act. *See Ciccone* v. *Textron, Inc.*, 616 F.2d 1216 (1st Cir. 1980), *vacated*, 449 U.S. 914 (1980), *on remand*, 651 F.2d 1 (1st Cir. 1981), *cert. denied*, 452 U.S. 917 (1981); *Ewald* v. *Great Atlantic and Pacific Tea Co.*, 620 F.2d 1183 (6th Cir.), *vacated*, 449 U.S. 914 (1980), *on remand*, 644 F.2d 884 (6th Cir. 1981).

We agree with the Third Circuit's opinion in *Davis* v. *Calgon Corporation*, 627 F.2d 674 (3d Cir. 1980), *cert. denied*, 449 U.S. 1101 (1981). In *Davis*, the plaintiff filed a complaint with the state fair employment agency 213 days after the discriminatory discharge. Ten days later he filed a charge with the Secretary of Labor. Although the district court was located in a referral state, it found that the 300-day filing period was not available to the plaintiff. The district court held the filing with the state agency was untimely and applied the 180-day filing period. The Third Circuit reversed, holding that a plaintiff in a deferral state is entitled to the 300-day filing period whether or not the state filing occurred within the state limitations period or within 180 days after the act of discrimination. *Id.*, at 657, 677. *Accord Jones* v. *AIRCO Carbide Chemical Co.*, No. 81-5306, slip op. (6th Cir. October 28, 1982); *Aronsen* v. *Crown Zellerbach*, 662 F.2d 584, 587 (9th Cir. 1981); *Goodman* v. *Heublein, Inc.*, 645 F.2d 127 (2d Cir. 1981); *Ciccone*, 616 F.2d at 1220; *Morrison* v. *United Parcel Service*, 515 F. Supp. 1317, 1319-20 (W.D. Okla. 1981). Accordingly, we hold that deferral state claimants are not required to make a timely filing with the state agency before the federal 300 day filing period applies. All that is required is that a filing with the state agency be made with sufficient time to allow an effective filing with the EEOC within 300

days after the discriminatory act. *Jones*, No. 81-5306, slip op. at 4-8.

MDMH also contends that the present action is untimely because it was not filed with the EEOC within 300 days after Rasimas' termination on July 15, 1975. MDMH admits that Rasimas initiated complaints at the EEOC and the Michigan Civil Rights Commission March 16, 1975, 244 days after he was terminated. MDMH maintains, however, that March 16 cannot be treated as the date the charge was formally "filed" with the EEOC according to *Mohasco Corp.*, 447 U.S. at 801. In *Mohasco*, the Court interpreted 42 U.S.C. 2000e-(5)(c) to preclude charges being filed with the EEOC in deferral states until 60 days after the state fair employment agency has received notice of the allegations. 447 U.S. at 815-23. Therefore, MDMH asserts the present action was not formally "filed" with the EEOC until four days after the 300 day filing period had expired. We disagree.

In *Wiltshire* v. *Standard Oil of California*, 652 F.2d 837, (9th Cir. 1981), *cert. denied*, 455 U.S. 1034 (1982), the Ninth Circuit exhaustively examined *Mohasco* and determined that it should not be applied to claims which were pending on the date the Supreme Court decision was announced. *Wiltshire*, 652 F.2d at 842. The Sixth Circuit has on two occasions approved *Wiltshire's* holding. First, *Hall* v. *Ledex, Inc.*, 669 F.2d 397, 399 (6th Cir. 1982) analyzed *Mohasco* and endorsed the well-reasoned *Wiltshire* opinion: "We agree with the Ninth Circuit that *Mohasco* should not be applied retroactively. *Wiltshire* v. *Standard Oil*, 652 F.2d 837 (9th Cir. 1981)." In *Jones*, this Court noted the *Hall* opinion and its approval of *Wiltshire*. *Jones*, No. 81-5306, slip op. at 66 n.3 The present action was filed in 1976, several years before *Mohasco* was announced. Therefore, applying the precedents of *Hall*, *Jones*, and *Wiltshire*, we hold the present action was timely filed with the EEOC.

III.

The Finding of Discrimination:

MDMH argues that the district court's finding of sex discrimination is clearly erroneous. MDMH asserts that Rasimas did not establish a prima facie case and the district court took certain comments Nagy made out of context. We disagree. The Supreme Court has explained that "[t]he burden of establishing a prima facie case of disparate treatment is not onerous." *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981). In *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), the Supreme Court described an appropriate model for establishing a prima facie case of discrimination:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802.

In the present case, Rasimas presented undisputed evidence which demonstrated his female subordinates were hostile and uncooperative. Moreover, his immediate supervisor referred to him in a sexually derogatory manner.[11] Standard procedures apparently were not followed in counseling him, and his female supervisors recommended his discharge without seriously considering his version of the events which transpired during the Belle Isle outing. We hold that this showing was more than adequate to "give rise to an inference of unlawful discrimination." *See Burdine*, 450 U.S. at 253.

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[11] Caron Swiatek admitted that she had called Rasimas a "male chauvinist" on at least one occasion.

MDMH also contends the statement: "The girls are out to get you," was taken out of context. Allegedly, the statement was merely an indication that Rasimas' female subordinates would be hostile toward any person in his position. Our examination of the record indicates that the district court's findings are amply supported. The district court was extremely sensitive to the context in which Swietec and Nagy commented on the staff's reaction to Rasimas. The court found that Swietec believed the staff's reaction was unrelated to Rasimas' sex. The court, however, heard similar testimony from Nagy and determined that the statement "the girls are out to get you" could be accepted without qualification. The district court, as trier of fact, need not credit a witness' explanation for making a particular statement. *See, e.g., Mabin* v. *Lear Siegler, Inc.*, 457 F.2d 806, 806-07 (6th Cir. 1972) (per curiam). Moreover, the district court's finding concerning the July 1, 1975 memo related to beliefs Nagy and Swietec held on July 1, 1975. It is not a blanket statement that Swietec and Nagy ultimately believed there were not sufficient grounds to terminate the plaintiff. Finally, there is ample evidence from which the district court could conclude that MDMH's assertion that Rasimas was fired for poor work performance was merely a pretext. Rasimas was hired and fired within two months even though his female supervisors knew his first several months would be a learning experience and his female staff was hostile and uncooperative.

IV.

Mitigation of Damages:

The duty to mitigate damages after discrimination has occurred is statutorily imposed by Section 706(g) of Title VII. *See* 42 U.S.C. § 2000e-5(g). Section 706(g) states in pertinent part: "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." This

duty has ancient origins, and operates to prevent claimants from recovering for damages which they could have avoided through reasonable diligence. *See Equal Employment Opportunity Commission* v. *Ford Motor Co.*, —U.S. —, 102 S.Ct. 3057, 3065 (1982), on remand, 688 F.2d 951 (1982).

The finding that a claimant has exercised reasonable diligence in seeking other suitable employment following a discriminatory discharge is an issue of fact which, on appeal, is subject to the "clearly erroneous" standard of Fed. R. Civ. P. 52(a). *See, e.g., Marks* v. *Prattco, Inc.*, 633 F.2d 1122, 1125 (5th Cir. 1981) (per curiam); *Equal Employment Opportunity Commission* v. *Sandia Corp.*, 639 F.2d 600, 627 (10th Cir. 1980). Once a claimant establishes a prima facie case and presents evidence on the issue of damages, the burden of producing sufficient evidence to establish the amount of interim earnings or lack of diligence shifts to the defendant. *See, e.g., NLRB* v. *Reynolds*, 399 F.2d 608, 669 (6th Cir. 1968); *McCann Steel Co.* v. *NLRB*, 570 F.2d 652, 655 n.4 (6th Cir. 1978); *Marks*, 633 F.2d at 1125; *Sandia Corp.*, 639 F.2d at 627; *Taylor* v. *Philips Industries, Inc.*, 593 F.2d 783, 787 (7th Cir. 1979); *Sias* v. *City Demonstration Agency*, 588 F.2d 692, 696 (9th Cir. 1978); *Equal Employment Opportunity Commission* v. *Lee Way Motor Freight, Inc.*, 625 F.2d 918, 937 (10th Cir. 1979); *Sangster* v. *United Airlines, Inc.*, 633 F.2d 864, 868 (9th Cir. 1980), *cert. denied*, 451 U.S. 971 (1981). The Defendant may satisfy his burden only if he establishes that: 1) there were substantially equivalent positions which were available; and 2) the claimant failed to use reasonable care and diligence in seeking such positions. *Sias*, 588 F.2d at 696; *Sandia*, 639 F.2d at 627.

A. Substantial Equivalent Employment

In *Rutherford* v. *American Bank of Commerce*, 12 Fair Empl. Prac. Cas. (BNA), 1184 (D. N.M. 1976), aff'd, 565 F.2d 1162 (10th Cir. 1977), the plaintiff, a loan officer trainee with over

six years experience, resigned over a dispute concerning her job duties. Plaintiff filed a sex discrimination charge with the EEOC and began searching for other substantially equivalent employment. During her search, Fidelity Bank offered her a job as a "float." Plaintiff refused. American Bank of Commerce, the defendant, argued that plaintiff had failed to mitigate her damages. The court disagreed:

> [American Bank of Commerce] argues that Rutherford failed to mitigate damages. There is no support for this contention. Her refusal of an offer by Fidelity Bank as a "float" because it took no account of her years of experience and offered only remote possibilities for comparable advancement, does not aid ABC's theory. Nor does ABC suggest any reason why Rutherford should be required to accept inferior employment. In the area of employment contracts comparability of status has been deemed more important in some situations than comparability of salary, for example in the context of mitigation. *See Williams* v. *Albemarle City Bd. of Education*, 508 F.2d 1242 (4th Cir. 1974). Failure of plaintiff to seek reemployment with ABC also does not bar recovery.

12 Fair Empl. Prac. Cas. at 1190.

We hold that the substantial equivalent of the position from which the claimant was discriminatorily terminated must afford the claimant virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status. *See Ford Motor Co.*, 102 S.Ct. at 3065 ("Although the un- or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position, he forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied."); *McCann Steel Co.* v. *NLRB*, 570 F.2d 652, 655 (8th Cir. 1978) ("We believe that substantially equivalent employment refers to the hours worked . . . as well as the nature of the work there."); *Stone* v. *D.A. & S. Oil Well Servicing, Inc.*, 624 F.2d 142, 144 (10th Cir.

1980); *Williams* v. *Albemarle City Board of Education*, 508 F.2d 1242, 1243 (4th Cir. 1974) (*en banc*); *Ballard* v. *El Dorado Tire Co.*, 512 F.2d 901, 906 (5th Cir. 1975).

B. Reasonable Diligence

A claimant is only required to make reasonable efforts to mitigate damages, and is not held to the highest standards of diligence. The claimant's burden is not onerous, and does not require him to be successful in mitigation. *See, e.g., Lee Way Motor Freight*, 625 F.2d at 938; *Sandia Corp.*, 639 F.2d at 627; *NLRB* v. *Pilot Freight Carriers, Inc.*, 604 F.2d 375, 377 (5th Cir. 1979). The reasonableness of the effort to find substantially equivalent employment should be evaluated in light of the individual characteristics of the claimant and the job market. *See Stone*, 624 F.2d at 144 (Reasonable diligence shown where job seeker voluntarily left non-comparable part-time employment to seek substantially equivalent work in another location); *Falls Stamping & Welding Co.* v. *International Union United Automobile, Aircraft and Agricultural Workers of America*, 667 F.2d 1026 (6th Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982) (Older claimants need not exert as much effort as young claimants).

In the present case, the district court recognized that the defendant had the burden of demonstrating Rasimas' conduct was so unreasonable as to constitute a failure to mitigate damages. MDMH attempted to meet its burden by showing that Rasimas had, on at least two occasions, rejected substantially equivalent positions.

First, on April 20, 1976, Rasimas was sent a form letter asking him to interview for a recreation aide position. The letter, however, did not inform him of his right of first refusal with respect to the position. MDMH argues that Rasimas' refusal to interview should toll the accrual of backpay and constitute a willful failure to mitigate damages. We disagree.

In *Ford Motor Co.*, the Supreme Court summarized the mitigation of damages rule where the employer offered the claimant a position as follows:

> An unemployed or underemployed claimant, like all other Title VII claimants, is subject to the statutory duty to minimize damages set out in § 706(g)." This duty, rooted in an ancient principle of law, requires the claimant to use reasonable diligence in finding other suitable employment. Although the un- or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position, he forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied. Consequently, an employer charged with unlawful discrimination often can toll the accrual of backpay liability by unconditionally offering the claimant the job he sought, and thereby providing him with an opportunity to minimize damages. An employer's unconditional offer of the job originally sought to an un- or underemployed claimant, moreover, need not be supplemented by an offer of retroactive seniority to be effective . . . .

102 S.Ct. 3065.

In the present case, it can hardly be disputed that the recreation aide position is not the substantial equivalent of the supervisor 10 position. The responsibilities as an activities aide in implementing recreational programs for the resident-patients with multiple handicaps are obviously not co-extensive with those of the supervisor 10 to whom he reports. In fact, it is clear that the request to interview was little more than an attempt to get Rasimas to accept a demotion. Moreover, the interview letter was neither "unconditional" nor "an offer of employment." *See Stone*, 824 F.2d at 144. An invitation to interview is, at best, a job offer which is contigent upon the applicant having the best qualifications. Moreover, Rasimas was never informed that he had the right of first refusal with respect to the recreation aide's position.

Second, on November 9, 1979, Rasimas was offered an opportunity to interview for a position as Assistant Rights Advisor at the Alpine Regional Center in Gaylord, Michigan. He declined to interview for the position. MDMH argued before the district court that this conduct constituted a willful failure to mitigate damages. The district court held that Rasimas could, consistent with his duty to mitigate damages, refuse to interview for a position 223 miles from his home in Warren, Michigan. We agree.

It is well settled that a claimant has not failed to make a reasonable effort to mitigate damages where he refused to accept employment that is an unreasonable distance from his residence. In *Oman Construction Co., Inc.*, 144 NLRB Dec. (CCH) 1534 (1963), *enf'd.*, 338 F.2d 125 (6th Cir. 1964), *cert. denied*, 381 U.S. 925 (1965), the discriminatorily discharged employee refused to accept a job more than 200 miles from his home in Nashville. This Court enforced the National Labor Relations Board order which held that the employee's refusal did not constitute a failure to mitigate damages. Similarly in *NLRB* v. *Madison Courier, Inc.*, 472 F.2d 1307 (D.C. Cir. 1972), the court held that the duty to make reasonable efforts to find employment did not obligate claimants "to seek work in Louisville or other areas located over 50 miles from Madison, due to the excessive commute such jobs would have entailed." *Id.* at 1314. *See, e.g., Florence Printing Co.* v. *NLRB*, 376 F.2d 216, 221 (4th Cir.), *cert. denied*, 389 U.S. 840 (1967); *Jackson* v. *Wheatley School Dist.*, 464 F.2d 411, 413-14 (8th Cir. 1972); *Wells* v. *Hutchinson*, 499 F. Supp. 174, 205 (E.D. Tex. 1980).

V.

Accordingly, we affirm the sex discrimination finding, but reverse the timeliness and mitigation of damages determinations. We commend the district court for its careful and sensitive treatment of the facts. Detailed findings of fact do much

to enhance the quality of appellate review. The district court never fully addressed the backpay issue due to its rulings on other issues. Therefore, this action is remanded to the district court for further proceedings consistent with this opinion. On remand the court should award backpay in accordance with the following guidelines.

A backpay award should make the claimant whole, that is, to place him in the position he would have been in but for discrimination. In *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), the Supreme Court held:

> [G]iven a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purpose of eradicating discrimination throughout the economy and making persons whole for injuries suffered for past discrimination.

Id. at 421. Thus, in the absence of exceptional circumstances, backpay should always be awarded when a Title VII violation is found. *See, e.g., Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 719 (1978); *Head* v. *Timkon Roller Bearing Co.*, 486 F.2d 870, 876 (6th Cir. 1973); *Meadows* v. *Ford Motor Co.*, 510 F.2d 939, 945 (6th Cir. 1975); *Stewart* v. *General Motors Corp.*, 542 F.2d 445, 451 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977); *Kirby* v. *Colony Furniture Co., Inc.*, 613 F.2d 696, 699 (8th Cir. 1980). The special factors which would constitute exceptional circumstances and prevent backpay awards are exceedingly rare.[12] *See Albemarle Paper Co.*, 422 U.S. at 417; *Meadows*, 510 F.2d at 942; *Steward*, 542 F.2d at 451; *Kirby*, 613 F.2d at 699. Neither the arguable good faith of the defendant employer nor the difficulty in calculating the backpay award constitute exceptional

[12] If a district court should decline to award backpay, it should carefully articulate its reasons for selecting that course of action. *See Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 n.14 (1975).

circumstances. *See, e.g., Head*, 486 F.2d at 877; *Stewart*, 542 F.2d at 451; *Kirby*, 613 F.2d at 699; *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 253-54, 260 (5th Cir. 1974).

Backpay awards should completely redress the economic injury the claimant has suffered as a result of discrimination. A claimant, therefore, should receive the salary, including any raises, which he would have received but for discrimination. *See Satty* v. *Nashville Gas Co.*, 522 F.2d 850, 855 (6th Cir. 1975), *aff'd in part and vacated in part*, 434 U.S. 136 (1977); *Anderson* v. *Methodist-Evangelical Hospital, Inc.*, 464 F.2d 723 (6th Cir. 1972); *Paxton* v. *Union National Bank*, 29 Fair Empl. Prac. Cas. (BNA), 1233, 1252 (8th Cir. 1982); *Equal Employment Opportunity Commission* v. *Kallir, Phillips, Ross, Inc.*, 559 F.2d 1203 (2d Cir. 1977), *cert. denied*, 434 U.S. 920 (1977). Sick leave, vacation pay, pension benefits and other fringe benefits the claimant would have received but for discrimination should also be awarded. *See Meadows*, 510 F.2d at 948; *Satty*, 522 F.2d at 855; *Farmer* v. *Hotel Workers, Local 1064*, 21 Fair Empl. Prac. Cas. (BNA) 1599 (E.D. Mich. 1978), *aff'd in part and rev'd in part sub. nom. Farmer* v. *ARA Services, Inc.*, 660 F.2d 1096 (6th Cir. 1981); *Culp* v. *General American Transportation Corp.*, 517 F.2d 1404 (6th Cir. 1975); *Laugensen* v. *Anaconda Co.*, 510 F.2d 307, 317 (6th Cir. 1975); *Paxton* 29 Fair Empl. Prac. Cas. (BNA) at 1252; *Pettway*, 494 F.2d at 263; *Bowe* v. *Colgate, Palmolive Co.*, 489 F.2d at 903-04 (7th Cir. 1973); *Sandia*, 639 F.2d at 626; *Ingram* v. *Madison Square Garden Ctr. Inc.*, 482 F. Supp. 918, 926 (S.D.N.Y. 1979); *Willett* v. *Emory and Henry College*, 569 F.2d 212 (4th Cir. 1978). Backpay awards should not be reduced by the amount of income and social security taxes which would have been deducted from the wages the claimant would have received but for discrimination. *See Grant* v. *Bethlehem Steel Corp.*, 622 F.2d 43 (2d Cir. 1980).

Unemployment benefits also should not be deducted from backpay awards. This Circuit has on several previous occa-

sions affirmed district courts which have held that unemployment benefits should not be offset against backpay awards.[13] *See Falls Stamping & Welding Co.* v. *International Union United Automobile, Aircraft and Agricultural Workers of America*, 667 F.2d 1026 (6th Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982); *Mabin* v. *Lear Siegler, Inc.*, 4 Fair Empl. Prac. Cas. (BNA) 679, 687 (W.D.Mich. 1971), aff'd, 457 F.2d 806 (6th Cir. 1972); *Oman Construction Co., Inc.*, 144 NLRB Dec. 1543 1544 (1963), enf'd, 338 F.2d 125 (6th Cir. 1964). *But see, Satty, supra.* A number of other courts have also refused to reduce backpay awards by the amount of unemployment compensation received by the claimant. *See, e.g., Winn-Dixie Stores, Inc.* v. *NLRB*, 413 F.2d 1008, 1009-10 (5th Cir. 1969); *Isaac and Vinson Security Services, Inc.*, 208 NLRB Dec. 47 (1973), enf'd, 467 F.2d 213 (5th Cir. 1972); *International Assoc. of Machinists & Aerospace Workers* v. *Champion Carriers, Inc.*, 470 F.2d 744, 745 (10th Cir. 1972); *Tidwell* v. *American Oil Co.*, 332 F. Supp. 424, 437-38 (D. Utah 1971); *Abron* v. *Black & Decker Mfg. Co.*, 439 F. Supp. 1095,

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[13] As we understand our brother, Judge Hoffman, he personally would not deduct unemployment compensation from backpay awards. However, he feels constrained by *National Labor Relations Board* v. *Gullet Gin Co.*, 340 U.S. 361 (1951) to hold that the district court should have discretion in determining when to deduct unemployment compensation from a packpay award. *ante* at ——.

We disagree. Title VII is intended to establish a national backpay policy. That policy is to make "persons whole for injuries suffered from past discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975). It is inconsistent with this national policy to argue, as my brother implicitly has, that two identically situated claimants may be made "whole" by radically different backpay awards. To allow district courts to determine just how "whole" a claimant will be is antagonistic to the establishment of a uniform national policy.

Second, disallowing the deduction does not have a detrimental effect on a claimant's incentive to use "reasonable diligence" to find substantially equivalent employment. Moreover, if Congress did not intend for an employee to receive unemployment benefits in addition to back pay, the logical solution is a recoupment of the benefits by the state employment agency. In fact, in Michigan such a recoupment procedure already appears to exist. See MCLA § 421.62.

Finally, our brother appears to have overlooked the significance of the reasoning in *Gullett Gin*. There the Supreme Court explicitly rejected the rationale for deducting the unemployment compensation from backpay awards. The rationale is summarized as follows:

1115 (D. Md. 1977), *aff'd in part and vacated in part*, 654 F.2d 951 (4th Cir. 1981).

Backpay should be awarded even where the precise amount of the award cannot be determined. *See, e.g., Equal Employment Opportunity Commission* v. *Detroit Edison Co.*, 515 F.2d 301, 315 (6th Cir. 1975), *vacated on other grounds sub. nom. Utility Workers Union* v. *Equal Employment Opportunity Commission*, 431 U.S. 951 (1977); *Meadows*, 510 F.2d at 943; *Stewart*, 542 F.2d at 452; *Pettway*, 494 F.2d at 260-61. Any ambiguity in what the claimant would have received but for discrimination should be resolved against the discriminating employer. *See, e.g., Detroit Edison*, 515 F.2d at 315; *Kaplan* v. *Theatrical Employees Local 659*, 525 F.2d 1354, 1362-63 (9th Cir. 1975); *Pettway*, 494 F.2d at 260-61; *Stewart*, 542

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1) where the contributions to the fund from which the benefits derive are made solely by the defendant, the collateral source rule does not apply; 2) the plaintiff would otherwise receive a double recovery; and 3) the defendant would otherwise in effect be subject to punitive damages. *See Equal Employment Opportunity Commission* v. *Enterprise Association Steamfitters Local 638*, 542 F.2d 579, 591-92 (2d Cir), cert. denied, 430 U.S. 911 (1976). The Supreme Court rejected these arguments, stating:

> To decline to deduct state unemployment compensation benefits in computing backpay is not to make the employees more than whole, as contended by respondent. Since no consideration has been given or should be given to collateral losses in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received.
>
> But respondent argues that the benefits paid from the Louisiana Unemployment Compensation Fund were not collateral but direct benefits. With this theory we are unable to agree. Payments of unemployment compensation were not made to the employees by taxation. True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, the payments to the employees were not made to discharge any liability or obligation of respondent, but to carry out a policy of social betterment for the benefit of the entire state [citations omitted]. We think these facts plainly show the benefits to be collateral. It is thus apparent from what we have already said that failure to take them into account in ordering back pay does not make the employees more than "whole" as that phrase has been understood and applied.

Gullett Gin Co., 340 U.S. at 364.

F.2d at 452; *Bowe*, 489 F.2d 896, 902; *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1380 (5th Cir. 1974); *Kallir, Philips, Ross, Inc.*, 420 F.Supp. at 923; *NLRB* v. *Coca-Cola Bottling Co.*, 360 F.2d 569, 573 (5th Cir. 1966); *Croushorn* v. *Board of Trustees of Univ. of Tennessee*, 518 F. Supp. 9, 27 n.16 (M.D. Tenn. 1980). In *Detroit Edison*, this Court held that backpay equal to the maximum amount which could have been earned but for discrimination was appropriate where it was impossible to reconstruct the employment history of each claimant. 515 F.2d at 315.

HOFFMAN, Senior District Judge, concurring in part and dissenting in part.

I agree with the majority that the judgment[1] entered by the District Court on September 16, 1980, must be vacated and remanded. The reason is that the District Court relied upon the Supreme Court decision in *Mohasco Corp.* v. *Silver*, 447 U.S. 807 (1980), an opinion filed not quite three months prior to the judgment entered by the District Court in this case. A later opinion of the Supreme Court, *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), held that the statutory filing of charges with the Equal Employment Opportunity Commission (EEOC) was not a jurisdictional prerequisite, but was in the nature of a statute of limitations. Since the District Court never had the opportunity to consider the *Zipes* case,[2] I would vacate and remand to permit the District

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[1] The judgment was in favor of the Michigan Department of Mental Health (MDMH). The judgment reads:

> "For the reasons set forth in the Memorandum Opinion and Order issued this date:
>
> IT IS ORDERED AND ADJUDGED that the plaintiffs (sic) take nothing, and that the action be dismissed on the merits. Each party is to pay its own costs of action."

The judgment was entered pursuant to a motion to dismiss filed by MDMH a few days prior to the scheduled trial date. After hearing argument on the motion, the District Court reserved its ruling and decided to proceed with the trial as the witnesses were then available. Whether treated as a motion to dismiss or a motion for summary judgment, it is apparent that the final ruling in favor of the defendant was due to the jurisdictional question presented.

[2] I agree that this Circuit had previously ruled in accordance with *Zipes* that the filing requirement was, like a statute of limitations, subject to waiver, estoppel and equitable tolling. *See: Leake* v. *Cincinnati*, 605 F.2d 255 (6th Cir. 1979). The District Court did, however, make an express conclusion of law that "plaintiff has alleged no facts which would justify the tolling of the 300-day period on equitable grounds," citing the *Leake* case and *Fox* v. *Eaton Corp.*, 615 F.2d 716 (6th Cir. 1980). Since "equitable tolling" requires reasonable reliance upon defendant's conduct or representations, *Leussen* v. *Burlington Industries, Inc.*, 683 F.2d 882, 884 (4th Cir.), *cert. denied*, 51 U.S.L.W. 3299 (U.S. Oct. 19, 1982) (No. 82-325), it would appear that the District Court is correct as to this legal conclusion. Nevertheless, the District Court may wish to review its conclusions on this issue by reason of *Zipes*.

Court to make specific findings and conclusions on this phase of the case, together with other matters mentioned herein. At this point my agreement with the majority ends.

In *Zipes*, the Supreme Court said:

> By holding compliance with the filing period to be not a jurisdictional prerequisite to filing a Title VII suit, but a requirement subject to waiver as well as tolling when equity so requires, we honor the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer.

The majority opinion reverses the District Court and deprives it of the opportunity to consider waiver and tolling. While the ultimate result may be in accordance with the majority's views, this is a function of the District Court and not the appellate court. Of course, if neither *Mohasco* nor *Zipes* are to be considered retroactive, then the Sixth Circuit holdings in *Hall* v. *Ledex, Inc.*, 669 F.2d 397, 399 (6th Cir. 1982), and *Jones* v. *AIRCO Carbide Chemical Co.*, 691 F.2d 884 (6th Cir. 1982)[3] are applicable.

In *Zipes*, the Supreme Court could have readily disposed of the retroactive effect occasioned by any change in the law by simply holding that the charges filed with the EEOC were long prior to *Mohasco* and hence nonretroactive. The Supreme Court in *Zipes* did not discuss any issues of retroactivity. I believe that *Zipes* now compels a finding on waiver and/or tolling to be made by the District Court, although the tolling issue has been specifically decided against the plaintiff by the District Court's findings of fact and conclusions of law (See, Conclusions of Law (2)).

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[3] *Jones* v. *AIRCO* did not rule upon the retroactive effect of *Mohasco* as the filing with the EEOC was subsequent to *Mohasco*. See: 669 F.2d at 399, footnote 3.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

My concern with the findings of fact and conclusions of law rests with the conclusions of law. The findings are, of course, binding upon this court unless clearly erroneous.

Under Conclusion (6) the District Court describes the type of discrimination which existed among the females who worked under plaintiff, and who were under his supervision. The findings do not point the finger of discriminatory practice against the persons who were superior to Rasimas, i.e., Rosen (Director), McDonald (Administrative Officer in charge of personnel), Nagy (a female Director of the Nursing Home program), and Swietec, known as Caron Bender during the pertinent period involved, (a female mental retardation supervisor 10). The most that can be said with respect to plaintiff's superiors is that (1) they paid too much attention to the complaints of the staff working under Rasimas, and (2) before making the final decision to discharge Rasimas, the superiors did not discuss the Belle Isle incident with Rasimas although, as the District Court noted, there are essentially no factual disputes — the differences between Rasimas and his staff were matters of judgment as to whether he should have returned to the Hoover Nursing Home when Donna, the very young child, became ill.[4]

In discussing the type of discrimination to which Rasimas was subjected, the District Court had this to say:

> However, in the case of a white male, not a member of any readily identifiable ethnic minority, common sense may balk at a presumption that adverse treatment of him is the result of an alleged discriminatory motive, even where that treatment is at the hands of the oppo-

[4] The prior experience of Rasimas dealing with young children was at Northville where the children were young adults. The Hoover Nursing Home accepted much younger children, all of whom were under 16 years of age. Understandably, a child age 5 or thereabouts must be accorded different treatment than that accorded an 18 year old.

site sex, and even where there is no objectively verifiable legitimate motivation. Simply put, the difficulty is this: why should anyone presume that women would treat a man less favorable than another woman? The historical context of discrimination of this sort is not as readily apparent as that of discrimination against Blacks or women.

Nonetheless, the Court deems that an inference of sexual discrimination can be drawn from the facts constituting the prima facie case described above. The same sexual role stereotypes that have caused women to be channeled either away from the job marketplace altogether, or into lower-paying jobs than men, necessarily have their counterparts in male sexual role stereotypes. Thus, as women are stereotypically expected to be sexually passive or submissive, men are, according to stereotypes, expected to be aggressive and dominant. Further, as women are stereotypically expected to be less suited to the business world and more suited to domestic roles, similarly men are stereotypically expected to be better in business related roles and less suited for domestic roles. In other words, hypothetically, a woman reacting to a man in a stereotypical manner would be more inclined to view him as insensitive to children than she would viewing another woman in the same circumstances.

Based upon the evidence adduced at trial, the Court believes that the plaintiff in this case was victimized by exactly such a stereotypical view.

The "stereotypical" theory has not, according to my research, been injected into any theory of *intentional* discrimination. As this is a disparate treatment case, it is now well-settled that a finding of *"intentional discrimination"* is necessary to support the ultimate finding of illegal discrimination. As stated in the recent case of *United States Postal Service Board of Governors* v. *Aikens*, — U.S. —, 51 U.S.L.W. 4354 (decided April 4, 1983), in which the Supreme Court

remanded the case to the District Court for further findings because the District Court erroneously focused on the question of the *prima facie* case rather than on the question of discrimination, I would remand this case to the District Court for further findings as to "discriminatory intent." At no point in the factual findings has the District Court mentioned "discriminatory intent."[5] In *Aikens*, the Supreme Court was careful to note that once the trial court had determined that a *prima facie* case had been established, the *McDonnell-Burdine* presumption "drops from the case" and "the factual inquiry proceeds to a new level of specificity". Likewise, in *Aikens*, the Supreme Court reiterates its previous rulings that the factual inquiry in a Title VII case is "whether the defendant *intentionally*[6] discriminated against the plaintiff", citing *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981). Other than by inference derived from the legal conclusion of the District Court, I find no suggestion of *intentional* discrimination, especially with respect to the superiors of Rasimas who had the authority to hire and fire.[7]

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[5] I fully recognize that the second portion of 42 U.S.C. § 1985(2) privides: "[O]r if two or more persons *conspire* for the purpose of impeding, hindering, obsetructing, or defeating, in any manner, the due course of justice in any State or Territory, *with intent to deny any citizen the equal protection of laws*, or to injure him or his property for unlawfully, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws", provides an actionable basis for a suit predicated upon the private employment of "equal protection of the laws" and "equal privilege and immunities under the laws", but the District Court made no express finding that any conspiracy existed between the females who were working under Rasimas and the females who were his supervisors; nor did the amended complaint allege this issue. *Kush* v. *Rutledge*, —— U.S. ——, 51 U.S.L.W. 4356 (decided April 4, 1983).

[6] I concede that direct evidence of discriminatory *intent* is not required. The evidence may be direct or circumstantial. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 356 n.44 (1977); *Aiken*, *supra*, n.3.

[7] In *Board of Trustees* v. *Sweeney*, 439 U.S. 24 (1978), the Supreme Court had the occasion to distinguish between the employer's duty to "articulate some legitimate, nondiscriminatory reason for the employee's rejection" and "proving absence of discriminatory motive". In remanding *Sweeney*, the Supreme Court held that only *articu-*

For these reasons, and in accord with the principles set forth in *Aiken, supra,* I would remand this case to the District Court for additional findings as to the existence of *intentional* discrimination and with whom such intent existed. I have grave doubts as to whether such *intent,* if it existed, is chargeable to the supervisors of Rasimas who had the authority to recommend his discharge to McDonald, the Administrative Officer in charge of personnel. The discharge action may have been neither discriminatory nor praiseworthy. The action may have been the result of poor employee relations, but nevertheless not constitute discriminatory treatment.[8] Similarly, I entertain a doubt that an employer is required to interview an employee charged with poor judgment in an isolated incident (the Belle Isle's trip) where the facts are not in substantial disagreement, and that such failure to interview Rasimas in this case is any indication of discriminatory intent,[9] either with respect to one on probationary status as was Rasimas or as to any permanent employee.

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lation was required of the employer and, because the Court of Appeals had imposed a heavier burden on the employer, the case was remanded for reconsideration. The same situation exists in this case.

[8] See: Smith, *Employer Defenses in Employment Discrimination Litigation: A reassessment of Burdens of Proof and Substantive Standards Following Texas Department of Community Affairs* v. *Burdine,* 55 Temple U.L.R. 372, at 379.

[9] Not mentioned in the findings and conclusions, nor in the majority opinion, is an incident pertaining to the safety and well-being of the children — obviously a primary factor as to all aides and supervisors in the operation of a nursing home for mentally retarded and physically handicapped children of a young age — which incident occurred on June 14, 1975, well before the Belle Isle trip on July 12, 1975. The staff supervised by Rasimas, along with other concerned aides, signed a report of the incident which essentially alleges that Rasimas grabbed the back of a child's pants, the child fell to the floor crying and, after he was picked up and was returning to the East wing, Rasimas grabbed the child's leg and began to pull on it, thus causing the child to scream louder. While Rasimas did not testify at trial as to the specifics of this incident, his discovery deposition taken on May 28, 1980 (included in the record on appeal) gives this explanation (p. 49) "I recall — if I recall correctly, that was the incident involving a young resident, young black male resident, who I used to play around with, I liked him, and the inci-

MITIGATION OF DAMAGES

I agree with the majority that the actions of Rasimas, in declining to be interviewed in response to the letter of April 20, 1976 requesting same, should not, standing alone, diminish the damages to which Rasimas would be entitled, if he is entitled to any damages in this action. Assuming *arguendo* that the sole reason found by the District Court for mitigating the damages is predicated upon the actions of Rasimas in declining to be interviewed, this was error. However, on remand if it were possible under the majority opinion to consider findings on mitigation, I think that it would be permissible for the District Court to consider the age factor (Rasimas was 34 when he was discharged, and 39 at the time of trial in 1980); the fact that he had applied for comparable employment in Chicago (trial testimony), San Francisco (deposition testimony), and other locations not immediately in the area he lived; that he was unmarried, his family status, and why he could not accept employment in other areas; along with other related factors.

As the Supreme Court said in *Ford Motor Company* v. *Equal Employment Opportunity Commission*, — U.S. —, 102 S.Ct. 3057 (1982), 50 U.S.L.W. 4937, 4939:

> Under § 706(g), then, "backpay is not an automatic or mandatory remedy[.] . . . it is one which the courts 'may'

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dent occurred on the corner of one of the nursing stations. I came up from behind him and tickled him in the side, and then moved around him the other direction quickly so he wouldn't see me, and the little — the child, he was maybe eight or ten, turned to see who it was, and he lost his balance, and he slipped on the floor onto his butt. There were two nurses aids (sic) standing on the nurses station that saw this, and they jumped up and said: 'You shouldn't do that to him'. I didn't do anything to him, and why 13 signed it, I don't know, because only one or two were there."

While this incident, even assuming the truth of Rasimas' statement under oath, may not have justified any discharge at that time, his admitted act constituted, in my opinion, poor judgment in dealing with the safety and well-being of a young, mentally retarded, physically handicapped child.

> invoke" in the exercise of their "discretion [which] is equitable in nature."

Citing *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 415, 416 (1975).

While this case is being remanded to the District Court to determine damages, the majority opinion is written in such a manner as constituting a direction for the District Court to award full backpay, at least to the date of the District Court's opinion rendered in September, 1980 — an award then in excess of $81,000.

UNEMPLOYMENT INSURANCE

The majority adopts a rule established by the majority opinion in *E.E.O.C.* v. *Ford Motor Co.*, 645 F.2d 183, 195-196 (4th Cir.), *rev'd on other grounds*, — U.S. —, 102 S.Ct. 3057 (1982), 50 U.S.L.W. 4937, thus making it mandatory on all district judges in the circuit to disregard the receipt of employment benefits in computing damages in discrimination cases. The District Court, in the present case, made no findings on this issue as it found for MDMH because of the time limitations. For the reasons expressed in my dissenting opinion in *E.E.O.C.* v. *Ford Motor Co.*, 645 F.2d at 200, 210 (4th Cir. 1981), I feel that the Supreme Court, in *N.L.R.B.* v. *Gullett Gin Co.*, 340 U.S. 361, 364 (1951), has held that this issue should be left solely to the discretion of the District Court.

It may be argued that in *Ford Motor Co.* v. *E.E.O.C.*, *supra*, the Supreme Court did not discuss this issue and, therefore, tacitly approved the ruling of the Fourth Circuit majority. The fact is that any such ruling by the Supreme Court was wholly unnecessary to the decision in that case as the two women involved who had received unemployment insurance were cut off from any backpay long prior to the receipt of unemployment benefits in accordance with the Supreme

Court's ruling that they were required to accept an unconditional offer of employment to an equivalent position

More significantly, the ruling of the majority in this case will create a conflict in the Sixth Circuit. In *Satty* v. *Nashville Gas Company*, 522 F.2d 850, 855 (1975), *vacated and remanded on other grounds*, 434 U.S. 136 (1977), a panel of this court upheld the action of a District Court in reducing a discrimination award by the receipt of unemployment insurance. Thus, the majority in the instant case is changing the discretionary rule vested in district judges contrary to the Supreme Court in *Gullett Gin Co.* and the Sixth Circuit in *Satty*.

For the foregoing reasons, and with great respect, I am obliged to concur in part and dissent in part.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 80-1735/1736

DAVID L. RASIMAS,

Plaintiff-Appellant,
Cross-Appellee,

vs.

MICHIGAN DEPARTMENT OF
MENTAL HEALTH,

Defendant-Appellee,
Cross-Appellant.

Before: KEITH AND JONES, Circuit Judges; and HOFFMAN, Senior District Judge,

J U D G M E N T

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed in part, reversed in part and the case is remanded for further proceedings consistent with the opinion of this Court.

Each party to bear its own costs on this appeal.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

s/
Clerk

A True Copy.

Issued as Mandate: November 10, 1983

COSTS: NONE

Attest:

Filing fee.....$
Printing.....$
Total.....$

s/
Deputy Clerk

NOS. 80-1735
80-1736

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID L. RASIMAS,	:	
	:	
Plaintiff-Appellant,	:	
Cross Appellee	:	
	:	
vs	:	
	:	O R D E R
MICHIGAN DEPARTMENT OF MENTAL HEALTH,	:	
	:	
	:	
Defendant-Appellee,	:	
Cross-Appellant.	:	

BEFORE: KEITH and JONES, Circuit Judges, and JOFFMAN*, District Court Judge

A majority of the judges of the Court having not favored rehearing, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, the Court concludes that the petition for rehearing is without merit. Accordingly, it is

ORDERED that the rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT
JOHN P. HEHMAN, CLERK

s/

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*Honorable Walter E. Hoffman, Senior District Court Judge, Norfolk, Virginia

Office - Supreme Court, U.S.
FILED
APR 2 1984
ALEXANDER L. STEVAS,

NO. 83-1258

In the Supreme Court of the United States

OCTOBER TERM, 1983

MICHIGAN DEPARTMENT OF MENTAL HEALTH,

Petitioner,

vs.

DAVID L. RASIMAS,

Respondent.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The following questions are a clarification of Petitioner's Questions Presented for Review.

I. SHOULD THIS COURT GRANT CERTIORARI ON THE QUESTION OF WHETHER *MOHASCO CORP* V *SILVER*, 447 U.S. 807 (1980), SHOULD BE APPLIED RETROACTIVELY?

II. SHOULD THIS COURT GRANT CERTIORARI ON THE COURT OF APPEAL'S APPLICATION OF *DAVIS* V *CALGON CORP.*, 627 F.2d 674 (3rd Cir. 1980), *cert. denied*, 449 U.S. 101 (1981)?

III. SHOULD THIS COURT GRANT CERTIORARI ON WHETHER THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S FINDING OF DISCRIMINATION?

IV. SHOULD THIS COURT GRANT CERTIORARI ON WHETHER UNEMPLOYMENT BENEFITS SHOULD BE DEDUCTED FROM A BACKPAY AWARD PRIOR TO THERE BEING ANY DETERMINATION OF BACKPAY?

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NO. 83-1258

In the Supreme Court of the United States

OCTOBER TERM, 1983

MICHIGAN DEPARTMENT OF MENTAL HEALTH,

Petitioner,

vs.

DAVID L. RASIMAS,

Respondent.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The United States District Court for the Eastern District of Michigan, Southern Division (hereinafter "District Court") after a bench trial before the Honorable James Harvey rendered a Memorandum Opinion and Order and Judgment

dismissing the within cause of action. *David L. Rasimas* v *Michigan Dept. of Mental Health*, No. 77-71697 (E.D. Mich., Sept. 16, 1980). In its Memorandum Opinion and Order the District Court held that Respondent's discharge was the product of illegal discrimination based upon his sex. However, the District Court nevertheless dismissed the case for the reason that under the law of *Mohasco Corp.* v *Silver*, 447 U.S. 807 (1980), Respondent did not make a timely filing with the Equal Employment Opportunity Commission (hereinafter "EEOC"). In addition, the District Court held that Respondent failed to mitigate his damages by refusing to accept an interview offered by the Petitioner. Respondent appealed from the Judgment of the District Court to the United States Court of Appeals for the Sixth Circuit (hereinafter "Sixth Circuit") on the issues of timeliness and mitigation of damages. The Petitioner filed a cross appeal on the question of discrimination.

In *Rasimas* v *Michigan Dept. of Mental Health*, 714 F.2d 614 (6th Cir. 1983) the Sixth Circuit affirmed the District Court's finding of sex discrimination and reversed the timeliness and mitigation of damages determinations. Further, the Sixth Circuit after "commend[ing] the District Court for its careful and sensitive treatment of the facts," remanded this action to the District Court for further proceedings consistent with its opinion to address the backpay issue which had not been fully addressed by the District Court due to its rulings on other issues.

The Petitioner then filed a Petition for Rehearing which was denied, *Rasimas* v *Michigan Dept. of Mental Health*, 714 F.2d 614 (6th Cir., *reh'g denied* November 2, 1983).

JURISDICTIONAL GROUNDS

On July 28, 1983 the Sixth Circuit decided and filed its opinion affirming the District Court judgment in part, reversing it in part and remanding the case to the District Court for further proceedings consistent with its opinion.

Subsequent to the opinion of July 28, 1983 a Judgment consistent therewith was entered by order of the Sixth Circuit.

Petitioner sought a rehearing which was denied by the Sixth Circuit on November 2, 1983 for the reason that the petition for rehearing was without merit.

Petitioner has now petitioned this Court for a Writ of Certiorari pursuant to 28 U.S.C. §1254(1) requesting review of the Sixth Circuit's Opinion of July 28, 1983 and its order denying rehearing dated November 2, 1983.

STATEMENT OF THE CASE

Respondent does not adopt the statement of the case presented by Petitioner as it is laced with inaccuracies and omissions.

Respondent adopts as its statement of the case, with the exceptions as noted below, and incorporates by reference herein as if fully set forth, the District Court's "Findings of Fact" as set out in Judge Harvey's Memorandum Opinion and Order dated September 16, 1980 and contained in the Appendix to Petitioner's Petition For a Writ of Certiorari as pages 3a–42a and the Opinion of the Sixth Circuit contained in the aforementioned Appendix as pages 43a–66a.

Respondent takes exception to the second sentence of the District Court's Finding of Fact number 45 (p 24a) as knowledge of this fact was not obtained from the testimony of Respondent or from Exhibit #1, p 3, but only from the testimony of Petitioner's witness Mr. McDonald. Further, Respondent testified that he had no knowledge or information that any position whatsoever was ever available to him or that he had a right of first refusal. (See District Court Finding of Fact #47, p 25a).

SUMMARY OF ARGUMENT

Petitioner's questions do not present special and important reasons for the granting of a Writ of Certiorari by this Court. The Opinion of the Court of Appeals for the Sixth Circuit does not create a conflict among the Courts of Appeal, it does not present any ripe issues of national or general importance and it does not present issues that are likely to recur.

ARGUMENT

Generally speaking the issue presently before this Court is whether the decision of the Sixth Circuit should be reviewed by this Court. Sup. Ct. R. 17 states that review by this Court on Writ of Certiorari is not a matter of right, but a matter "of judicial discretion, and will be granted only when there are special and important reasons therefor." Sup. Ct. R. 17 also states that the character of reasons that will be considered in whether to grant a Writ of Certiorari are indicated by the following:

(a) When a Federal Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals;

(b) When a Federal Court of Appeals has decided a federal question in a way in conflict with a State Court of last resort;

(c) When a Federal Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision;

(d) When a State Court of last resort has decided a federal question in a way in conflict with the decision of another State Court of last resort or of a Federal Court of Appeals;

(e) When a State Court or Federal Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The present case does not involve any of the considerations enumerated in Sup. Ct. R. 17, nor does it involve considerations of the same character of those enumerated in Sup. Ct. R. 17.

I.

THIS COURT SHOULD NOT GRANT CERTIORARI ON THE QUESTION OF WHETHER *MOHASCO CORP.* V *SILVER*, 477 U.S. 807 (1980), SHOULD BE APPLIED RETROACTIVELY.

The Petitioner seeks review by this Court of the Sixth Circuit's decision not to apply *MOHASCO CORP.* v *SILVER*, 477 U.S. 807 (1980), retroactively.

In deciding that the present action was timely filed with the EEOC, the Sixth Circuit stated that the Ninth Circuit in *Wiltshire* v *Standard Oil of California*, 652 F.2d 837, (9th Cir. 1981), *cert. denied*, 455 U.S. 1034 (1982) "exhaustively examined *Mohasco* and determined that it should not be applied to claims which were pending on the date the Supreme Court decision was announced," *Rasimas* v *Michigan Dept of Mental Health*, 714 F.2d 614, 622 (6th Cir. 1983). The Sixth Circuit went on to state that on two other occasions it had approved the *Wiltshire* holding.

> "First, *Hall* v *Ledex, Inc.*, 669 F.2d 397, 399 (6th Cir. 1982) analyzed *Mohasco* and endorsed the well-reasoned *Wiltshire* opinion: 'We agree with the Ninth Circuit that *Mohasco* should not be applied retroactively. . . . In *Jones,*

this Court noted the *Hall* opinion and its approval of *Wiltshire. Jones,* 691 F.2d at 1202 n.3." *Rasimas, Id.*

In the instant action the Sixth Circuit stated Respondent had filed his lawsuit in 1976, several years before *Mohasco* was announced and therefore, applying the precedents of *Hall, Jones* and *Wiltshire* held the present action to be timely filed with the EEOC.

In not applying *Mohasco* retroactively the Sixth Circuit did not create a conflict among the Circuits on a point of federal law, and the goal of a uniform application of federal law in the intermediate federal court system has therefore been achieved. Further evidence of uniformity has also been demonstrated in the Tenth Circuit in the case of *Cruz* v *Board of Education for the City of Trinidad School*, 537 F. Supp. 292 (D. Col., 1982), where the United States District Court for the District of Colorado also adopted the *Wiltshire* decision.

Next, the Sixth Circuit decision regarding retroactive application of *Mohasco* in the instant case presents no grounds for review that have not already been considered by this Court in its denial of a petition for writ of certiorari in the *Wiltshire* case where all the questions presented for review challenged the Ninth Circuit ruling that *Mohasco* was not to be applied retroactively, Docket No. 81-1152, filed December 18, 1981.

Further, as there are so few reported decisions regarding the retroactive application of *Mohasco,* all of which have been cited herein including the within cause, and because of the length of time since this Court's decision in *Mohasco* there is little likelihood this issue will recur.

Finally, the question presented for review is not one of general importance. While important to the litigants, the question lacks overall national importance, for the Sixth Circuit in following established precedent has decided a case that only affects the individual parties and not the general public.

II.

THIS COURT SHOULD NOT GRANT CERTIORARI ON THE COURT OF APPEAL'S APPLICATION OF *DAVIS* V *CALGON CORP.*, 627 F.2d 674 (3rd Cir. 1980), *cert. denied,* 449 US 1101 (1981).

Petitioner seeks review by this Court of the Sixth Circuit's application of *Davis* v *Calgon Corp.*, 627 F.2d 674 (3rd Cir. 1980), *cert. denied,* 449 U.S. 1101 (1981). They are not challenging the substance of the deferral extension rule set forth in *Davis* nor are they alleging a conflict among the Courts of Appeal regarding the substance of the deferral extension rule. Rather, they are challenging the Sixth Circuit's application of *Davis*.

The position that in a deferral state a complaint need not be timely filed under state law before the claimant can benefit from the three hundred (300) day federal filing period was upheld by the United States Supreme Court when it summarily reversed and remanded two circuit court opinions holding otherwise. See *Ciccone* v *Textron Inc.*, 616 F.2d 116 (1st Cir. 1980), *vacated,* 449 U.S. 914 (1980), *on remand,* 651 F.2d 1 (1st Cir. 1981), *cert. denied,* 452 U.S. 917 (1981); and *Ewald* v *Great Atlantic and Pacific Tea Co,* 620 F.2d 1189 (6th Cir. 1980) *vacated,* 449 U.S. 914 (1980), *on remand,* 644 F.2d 884 (6th Cir. 1981), *cert. denied* 451 U.S. 985 (1981).

This is the position followed by the Third Circuit in *Davis* and the Sixth Circuit's application of *Davis* is not only in accord with the aforementioned Supreme Court holdings, but is not in conflict with any other Courts of Appeal at this time.

It might appear that the instant case is in conflict with older panels within the Sixth Circuit, but these decisions were overruled by the aforementioned Supreme Court decisions in *Ciccone,*

supra and *Ewald, supra.* Further, even if a conflict still remained between the instant case and the decisions of older panels within the Sixth Circuit, it is the task of the Sixth Circuit to reconcile its internal differences. It is not an occasion to invoke the jurisdiction of this Court. *Wisniewski* v *United States*, 353 U.S. 901, 902 (1957).

III.

THIS COURT SHOULD NOT GRANT CERTIORARI ON THE ISSUE OF WHETHER THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S FINDING OF DISCRIMINATION.

Petitioner requests a Writ of Certiorari on the ground that the District Court and the Sixth Circuit allegedly failed to find that Petitioner intentionally discriminated against Respondent.

Whether or not there is intentional discrimination is a finding of fact to be made by the trial court. It is not a mixed question of law and fact that would allow an appellate court to review the facts to see if they satisfy some legal concept. Thus an appellate court may only reverse a district court's finding of discrimination if it concludes that the finding is clearly erroneous. Fed. R. Civ. P. 52(a).

In a Title VII action the Plaintiff must establish a prima facie case, which then creates a rebuttable presumption that the employer unlawfully discriminated against him. *U.S. Postal Service Board of Governors* v *Aikens*, ____ U.S. ____, 103 S. Ct. 1478, 1481, 75 L. Ed. 2d 403, 410 (1983), citing *Texas Department of Community Affairs* v *Burdine*, 450 U.S. 248, 254 (1981). Also see *McDonnell Douglas Corp.* v *Green*, 411 U.S. 792 (1973). To rebut this presumption, "the Defendant must produce evidence that the Plaintiff was rejected. . . for a legitimate, nondiscriminatory reason." *Id.*

> "But when the Defendant fails to persuade the district court to dismiss the action for lack of a *prima facie* case, and responds to the Plaintiff's proof by offering evidence of the reason for the Plaintiff's rejection, the fact finder must then decide whether the rejection was discriminatory within the meaning of Title VII." *Id.*, at 1482.

In the instant case the District Court very carefully and in great detail set forth its findings of facts and concluded that Respondent established a prima facie case of sexual discrimination. The District Court then went on to state that the Petitioner presented some legitimate reasons for Respondent's dismissal. However, after a full discussion the Court concluded that Respondent successfully rebutted these reasons, that these reasons constituted a pretext for Respondent's dismissal, and that his discharge was the product of illegal discrimination based upon his sex.

On appeal the Petitioner argued that the District Court's finding of sex discrimination was clearly erroneous and that Respondent did not present a prima facie case. The Sixth Circuit disagreed with this argument and affirmed the District Court's finding of sex discrimination.

Thus, it is clear from the decisions below that on the basis of all the facts and a determination of credibility, the Petitioner did intentionally discriminate against the Respondent on the basis of sex. Further, the decisions below were made with specific reference to the standards articulated by this Court in *McDonnell Douglas, supra,* and *Burdine, supra,* indicating that the Courts below correctly applied the appropriate standards for determining the existence of intentional discrimination.

Accordingly, as the action below did not conflict with the applicable decisions of this Court, the Petition should be denied on this issue.

Finally, Petitioner is seeking review by this Court on the basis that this Court would interpret the facts differently than

the Courts below. This Court however, is not the place to review a conflict of evidence nor the place to analyze an issue of fact. This type of review of an issue of fact where one judge might rule one way rather than the other is not "important" for purposes of Sup. Ct. R. 17.

IV.

THIS COURT SHOULD NOT GRANT CERTIORARI ON WHETHER UNEMPLOYMENT BENEFITS SHOULD BE DEDUCTED FROM A BACKPAY AWARD PRIOR TO THERE BEING ANY DETERMINATION OF BACKPAY.

Petitioner claims that this Court should grant certiorari on the issue of whether unemployment benefits should be deducted from backpay awards and claims this to be an important question of federal law that should be settled by this Court.

In its Opinion the Sixth Circuit points out that the backpay issue was never fully addressed by the District Court due to its rulings on other issues. Therefore, in remanding the within cause to the District Court for further proceedings consistent with its opinion the Sixth Circuit set forth certain guidelines for the District Court to follow in awarding backpay. However, there has been neither a determination nor actual award of backpay in the instant case. Moreover, there have been no findings of fact that Respondent ever received any unemployment compensation or if he received these benefits, whether or not he has to reimburse the State agencies which provided these monies. Also there has been no determination whatsoever that there would be a double recovery by the Respondent. Therefore, this challenge by the Petitioner is not ripe for review for as stated in *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143

(1974), "the challenged statute or regulation is generally not considered fit for adjudication until it has actually been applied."

To ask this Court to grant certiorari on this question now would be asking for an advisory opinion in advance of any adverse effect in the context of a concrete case and as pointed out in *International Longshoremen's and Warehousemen's Union, Local 37* v *Boyd*, 347 U.S. 222, 224 (1954), this "involves too remote and abstract an inquiry for the proper exercise of judicial function."

Finally, as Justice Fortas pointed out the reason for deferring consideration of abstract or premature claims is to allow governmental processes

> an opportunity to function — to iron out differences, to accomodate special problems. . . . The courts do not and should not pass on these complex problems in the abstract and the general — because these regulations peculiarly depend for their quality and substance upon the fact of particular situations. We should confine ourselves — as our jurisprudence dictates — to actual, specific, particularized cases and controversies, in substance as well as in technical analysis. *Abbott Laboratories* v *Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681; *Toilet Goods Association* v *Gardner*, 387 U.S. 158, 87 S.Ct. 1520, 18 L.Ed.2d 697; *Gardner* v *Toilet Goods Association*, 387 U.S. 167, 200, 87 S.Ct. 1526, 1543, 18 L.Ed.2d 704 (1967) (Fortas, J., concurring and dissenting)

Young v *Klutznick*, 652 F.2d 617 (6th Cir. 1981)

Further, Petitioner has failed to demonstrate any immediate injury which would occur were this Court not to act.

Hence, because the District Court has not had the opportunity to make findings of fact on this particular issue and apply

them according to the Sixth Circuit's guidelines and since Petitioner has failed to demonstrate any immediate injury which would occur were this Court not to act this issue is clearly not ripe for review.

CONCLUSION

For the foregoing reasons Petitioner has not presented special and important reasons why his Petition for a Writ of Certiorari should be granted. Wherefore, Respondent respectfully requests that this Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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